

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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Docket Nos. 18-2012, 18-2225, 18-2249, 18-2253, 18-2281,  
18-2332, 18-2416, 18-2417, 18-2418, 18-2419, 18-2422,  
18-2650, 18-2651, 18-2661, 18-2724, and 19-1385

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In re National Football League Players' Concussion Injury Litigation

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**JOINT APPENDIX  
Volume XI of XIII, Pages JA7170-JA8140**

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On appeal from Orders of the United States District Court for  
the Eastern District of Pennsylvania (Hon. Anita B. Brody),  
in No. 2:14-md-02323-AB and MDL No. 2323

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## **TABLE OF CONTENTS**

	<u>Page</u>
Dkt. 9960, Aldridge Objectors’ Notice of Appeal, filed May 3, 2018 .....	JA1
Dkt. 10036, Aldridge Objectors’ Notice of Appeal, filed June 1, 2018 .....	JA6
Dkt. 10043, Objector Miller’s Notice of Appeal, filed June 6, 2018 .....	JA11
Dkt. 10044, Objector Anderson’s Notice of Appeal, filed June 6, 2018 .....	JA13
Dkt. 10075, Mitnick Law Office’s Notice of Appeal, filed June 8, 2018 .....	JA15
Dkt. 10079, Anapol Weiss, P.C.’s Notice of Appeal, filed June 15, 2018 .....	JA17
Dkt. 10095, Kreindler & Kreindler, LLP’s Notice of Appeal, filed June 22, 2018 .....	JA19
Dkt. 10097, Faneca Objectors’ Notice of Appeal, filed June 22, 2018 .....	JA21
Dkt. 10099, Zimmerman Reed LLP’s Notice of Appeal, filed June 22, 2018 .....	JA24
Dkt. 10101, Armstrong Objectors’ Notice of Appeal, filed June 25, 2018 .....	JA27
Dkt. 10102, Pope McGlamry, P.C.’s Notice of Appeal, filed June 25, 2018 .....	JA29
Dkt. 10133, Faneca Objectors’ Amended Notice of Appeal, filed July 13, 2018 .....	JA32
Dkt. 10142, Anapol Weiss, P.C.’s Notice of Appeal, filed July 17, 2018 .....	JA35



Dkt. 10164, Aldridge Objectors’ Notice of Appeal, filed July 24, 2018.....	JA37
Dkt. 10166, Kreindler & Kreindler, LLP’s Notice of Appeal, filed July 25, 2018.....	JA40
Dkt. 10188, Class Counsel Locks Law Firm’s Notice of Appeal, filed Aug. 2, 2018 .....	JA42
Dkt. 10428, Aldridge Objectors’ Notice of Appeal, filed Feb. 15, 2019 .....	JA45
Dkt. 9860, Memorandum Opinion regarding: Total Amount of Common-Benefit Attorneys’ Fees, filed Apr. 5, 2018 .....	JA48
Dkt. 9861, Order regarding: Total Amount of Common-Benefit Attorneys’ Fees, filed Apr. 5, 2018.....	JA68
Dkt. 9862 Memorandum Opinion regarding: IRPA Fee Cap, filed Apr. 5, 2018 .....	JA70
Dkt. 9863, Order regarding: IRPA Fee Cap, filed Apr. 5, 2018.....	JA80
Dkt. 9876, Order regarding: Payments of Incentive Awards and Expenses, filed Apr. 12, 2018.....	JA82
Dkt. 10019, Explanation and Order regarding: Allocation of Common-Benefit Attorneys’ Fees, filed May 24, 2018 .....	JA84
Dkt. 10042, Order regarding: Alexander Objectors’ Motion for Reconsideration/New Trial, filed June 5, 2018 .....	JA111
Dkt. 10103, Order regarding: Payment of Attorneys’ Fees and Expenses, filed June 27, 2018.....	JA113
Dkt. 10104, Order regarding: Withholdings for Common Benefit Fund, filed June 27, 2018.....	JA115
Dkt. 10127, Order Denying Locks Law Firm’s Motion for Reconsideration of the Court’s Explanation and Order, filed July 10, 2018.....	JA117
Dkt. 10378, Explanation and Order, filed Jan. 16, 2019 .....	JA118

Civil Docket for Case No.: 2:12-md-2323-AB (E.D. Pa.).....	JA127
Dkt. 4, Case Management Order No. 1, filed Mar. 6, 2012 .....	JA693
Dkt. 52, Order Modifying Case Management Order No.1, filed Apr. 2, 2012 .....	JA718
Dkt. 64, Case Management Order No. 2, filed Apr. 26, 2012.....	JA721
Dkt. 71, Transcript of Apr. 25, 2012 Organizational Courtroom Conference, filed May 10, 2012 .....	JA726
Dkt. 72, Case Management Order No. 3, filed May 11, 2012.....	JA764
Dkt. 2583, Stipulation and Order regarding: Scheduling, filed July 16, 2012.....	JA767
Dkt. 2642, Plaintiffs' Amended Master Administrative Long-Form Complaint, filed July 17, 2012.....	JA773
Dkt. 3384, Order Denying Plaintiffs' Motion for Discovery, filed Aug. 21, 2012 .....	JA863
Dkt. 3587, Order regarding: Appointment of Defendant's Co-Liaison Counsel, filed Aug. 29, 2012 .....	JA864
Dkt. 3698, Plaintiffs' Uncontested Motion for Order Establishing a Time and Expense Reporting Protocol and Appointing Auditor, filed Sept. 7, 2012 .....	JA865
Dkt. 3710, Order Granting Plaintiffs' Uncontested Motion for Order Establishing a Time and Expense Reporting Protocol, filed Sept. 11, 2012 .....	JA948
Dkt. 4135, Order Granting Plaintiffs' Uncontested Motion for Extension of Deadline To File Initial Time Expense Reports, filed Oct. 31, 2012.....	JA960
Dkt. 4143, Order Granting Plaintiffs' Uncontested Motion for Additional Extension of Deadline To File Initial Time and Expense Reports, filed Nov. 8, 2012.....	JA961

Dkt. 5128, Order regarding: Appointment of a Mediator, filed July 8, 2013.....	JA962
Dkt. 5235, Order regarding: Proposed Settlement, filed Aug. 29, 2013 .....	JA964
Dkt. 5634, Motion of Proposed Co-Lead Counsel for Preliminary Approval of the Class Settlement Agreement, filed Jan. 6, 2014.....	JA966
Dkt. 5634-2, Exhibit B, Class Action Settlement Agreement.....	JA1003
Dkt. 5657, Memorandum Opinion Denying Preliminary Approval, filed Jan. 14, 2014 .....	JA1471
Dkt. 5658, Order Denying Preliminary Approval Without Prejudice, filed Jan. 14, 2014 .....	JA1483
Dkt. 5910, Order regarding: Court’s Jan. 14, 2014 Order, filed Apr. 16, 2014 .....	JA1484
Dkt. 5911, Stipulation and Order regarding: Apr. 15, 2014 Order, filed Apr. 16, 2014 .....	JA1485
Dkt. 6019, Faneca Objectors’ Motion To Intervene filed May 5, 2014 .....	JA1487
Dkt. 6019-1, Memorandum of Law in Support .....	JA1572
Dkt. 6073, Co-Lead Class Counsel’s Motion for Order Granting Preliminary Approval of Class Action Settlement, filed June 25, 2014.....	JA1639
Dkt. 6073-4, Declaration of Mediator and Former United States District Court Judge Layn R. Phillips in Support of Preliminary Approval of Settlement, filed June 25, 2014 .....	JA1929
Dkt. 6082, Response in Opposition to Motion for Approval of Class Action Settlement, filed July 2, 2014 .....	JA2041
Dkt. 6083, Memorandum Opinion Granting Preliminary Approval, filed July 7, 2014.....	JA2160
Dkt. 6084, Order Granting Preliminary Approval, filed July 7, 2014.....	JA2121

Dkt. 6087, Class Action Settlement Agreement as of June 25, 2014, filed July 7, 2014.....	JA2151
Dkt. 6107, Order Denying Faneca Objectors’ Motion To Intervene, filed July 29, 2014.....	JA2313
Dkt. 6109, Faneca Objectors’ Reply in Further Support of Motion To Intervene, filed July 29, 2014 .....	JA2314
Dkt. 6126, Response in Opposition regarding: Plaintiffs’ Motion for Extension of Time To File Response/Reply to Motion To Permit Access to Medical, Actuarial, and Economic Information, filed Aug. 8, 2014.....	JA2330
Dkt. 6160, Order Directing Special Master To File Actuarial Reports and Supplemental Information or Tabulations, filed Sept. 8, 2014 .....	JA2333
Dkt. 6166, Order Denying Petition of Objecting Class Members for Leave to Appeal District Court’s Order Granting Settlement, filed Sept. 11, 2014 .....	JA2334
Dkt. 6167, NFL Concussion Liability Forecast, filed Sept. 12, 2014 .....	JA2336
Dkt. 6167-1, Exhibit A, Supplemental Schedules .....	JA2407
Dkt. 6167-2, Exhibit B, Supplemental Schedules .....	JA2409
Dkt. 6167-3, Exhibit C, Supplemental Schedules .....	JA2411
Dkt. 6167-4, Exhibit D, Supplemental Schedules .....	JA2466
Dkt. 6168, Report of the Segal Group to Special Master Perry Golkin, filed Sept. 12, 2014 .....	JA2468
Dkt. 6168-1, Exhibit A, Part 1, Player Database .....	JA2522
Dkt. 6168-2, Exhibit A, Part 2, Player Database .....	JA2677
Dkt. 6168-3, Exhibit B, Plaintiff’s Sample Data .....	JA2809
Dkt. 6168-4, Exhibit C, Screenshot of Plaintiff’s Database .....	JA2879

Dkt. 6168-5, Exhibit D, Screenshot of Model Assumptions as Entered into Model .....	JA2881
Dkt. 6168-6, Exhibit E, Cash Flow Analysis .....	JA2884
Dkt. 6168-7, Exhibit F, Supplemental Schedules.....	JA2889
Dkt. 6169, Faneca Objectors’ Motion for Discovery, filed Sept. 13, 2014 .....	JA2960
Dkt. 6169-1, Memorandum of Law in Support of Motion for Limited Discovery.....	JA2963
Dkt. 6169-2, Exhibit A, Limited Discovery Requests.....	JA2977
Dkt. 6169-3, Exhibit B, Information on NFL Football Concussions .....	JA2996
Dkt. 6201, Faneca Objectors’ Objections, filed Oct. 14, 2014.....	JA3003
Dkt. 6201-1, Declaration of Eric R. Nitz, filed Oct. 6, 2014.....	JA3128
Dkt. 6201-2, Exhibits 1-5 .....	JA3143
Dkt. 6201-3, Exhibits 6-8 .....	JA3184
Dkt. 6201-4, Exhibits 9-12 .....	JA3214
Dkt. 6201-5, Exhibits 13-15 .....	JA3286
Dkt. 6201-6, Exhibits 16-25 .....	JA3385
Dkt. 6201-7, Exhibits 26-30 .....	JA3405
Dkt. 6201-8, Exhibits 31-36 .....	JA3434
Dkt. 6201-9, Exhibits 37-44 .....	JA3463
Dkt. 6201-10, Exhibits 45-51 .....	JA3492
Dkt. 6201-11, Exhibits 52-59 .....	JA3571
Dkt. 6201-12, Exhibits 60-66 .....	JA3752
Dkt. 6201-13, Exhibits 67-71 .....	JA3752

Dkt. 6201-14, Exhibits 72-76 .....	JA3776
Dkt. 6201-15, Exhibits 77-82 .....	JA3819
Dkt. 6201-16, Declaration of Robert A. Stern, filed Oct. 6, 2014.....	JA3858
Dkt. 6201-17, Declaration of Sean Morey, filed Oct. 6, 2014 .....	JA3919
Dkt. 6211, Faneca Objectors’ Motion for Leave To File a Reply in Support of Motion for Leave To Conduct Limited Discovery, filed Oct. 13, 2014.....	JA3923
Dkt. 6211-1, Memorandum of Law in Support of Movants’ Motion for Leave To File .....	JA3926
Dkt. 6232, Faneca Objectors’ Supplemental Objections, filed Oct. 14, 2014.....	JA3928
Dkt. 6232-1, Declaration of Sam Gandy and Exhibits .....	JA3933
Dkt. 6233, Armstrong Objectors’ Amended Objection to the June 25, 2014 Class Action Settlement Agreement, filed Oct. 14, 2014 .....	JA3971
Dkt. 6233-1, Declaration of Drs. Brent E. Masel and Gregory J. O’Shanick in Support of BIAA’s Motion for Leave to File <i>Amicus Curiae</i> Brief .....	JA4037
Dkt. 6233-2, Declaration of Richard L. Coffman.....	JA4049
Dkt. 6233-3, Declaration of Mitchell Toups .....	JA4051
Dkt. 6233-4, Declaration of Jason Webster.....	JA4053
Dkt. 6237, Aldridge Objectors’ Objections to June 25, 2014 Class Action Settlement Agreement, filed Oct. 14, 2014.....	JA4055
Dkt. 6244, Faneca Objectors’ Motion To Set Scheduling Conference Before Nov. 19, 2014, filed Oct. 15, 2014.....	JA4066
Dkt. 6252, Faneca Objectors’ Motion for Production of Evidence, filed Oct. 21, 2014.....	JA4073

Dkt. 6339, Faneca Objectors’ Notice regarding: Intent To Appear at Fairness Hearing, filed Nov. 3, 2014 .....	JA4078
Dkt. 6344, Order that Steven Molo Will Coordinate the Arguments of the Objectors at the Fairness Hearing, filed Nov. 4, 2014 .....	JA4111-1
Dkt. 6353, Letter from Mitchell A. Toups to Judge Brody dated Sept. 3, 2014 regarding: Objection to June 25, 2014 Class Action Settlement by Armstrong Objectors, filed Nov. 3, 2014 .....	JA4112
Dkt. 6420, Faneca Objectors’ Supplemental Objections., filed Nov. 11, 2014 .....	JA4144
Dkt. 6423-5, Declaration of Orran L. Brown, Sr., filed Nov. 12, 2014 .....	JA4157
Dkt. 6423-6, Supplemental Declaration of Mediator and Former United States District Court Judge Layn R. Phillips in Support of Final Approval of Settlement and Certification Class and Subclasses, filed November 12, 2014 .....	JA4236
Dkt. 6423-17, Declaration of Kenneth C. Fischer, M.D., filed Nov. 12, 2014 .....	JA4249
Dkt. 6423-18, Declaration of Christopher C. Giza, M.D., filed Nov. 12, 2014 .....	JA4267
Dkt. 6423-19, Declaration of David Allen Hovda, Ph.D, filed Nov. 12, 2014 .....	JA4316
Dkt. 6423-20, Declaration of John G. Keilp, Ph.D., filed Nov. 12, 2014 .....	JA4405
Dkt. 6423-21, Declaration of Thomas Vasquez, Ph.D., filed Nov. 12, 2014 .....	JA4452
Dkt. 6425, Faneca Objectors’ Statement regarding: Fairness Hearing, filed Nov. 14, 2014 .....	JA4539
Dkt. 6428, Notice of Counsel Permitted To Speak at Fairness Hearing, filed Nov. 17, 2014 .....	JA4542

Dkt. 6434, Faneca Objectors’ Objections, filed Nov. 18, 2014 .....	JA4544
Dkt. 6435, Faneca Objectors’ Statement regarding: Nov. 19, 2014 Fairness Hearing, filed Nov. 18, 2014 .....	JA4550
Dkt. 6455, Post-Fairness Hearing Supplemental Briefing of Objectors regarding: Faneca Objectors’ Motion for Final Order and Judgment, filed Dec. 2, 2014 .....	JA4551
Dkt. 6455-1, Supplemental Declaration of Robert Stern, filed Dec. 2, 2014 .....	JA4591
Dkt. 6455-2, Supplemental Declaration of Sam Gandy and Exhibits, filed Dec. 2, 2014 .....	JA4598
Dkt. 6455-3, Declaration of Patrick Hof and Exhibit, filed Dec. 2, 2014 .....	JA4647
Dkt. 6455-4, Declaration of Jing Zhang and Exhibit, filed Dec. 2, 2014 .....	JA4769
Dkt. 6455-5, Declaration of Martha Shenton and Exhibit, filed Dec. 2, 2014 .....	JA4792
Dkt. 6455-6, Declaration of Charles Bernick and Exhibit, filed Dec. 2, 2014 .....	JA4926
Dkt. 6455-7, Declaration of Michael Weiner and Exhibit, filed Dec. 2, 2014 .....	JA4940
Dkt. 6455-8, Declaration of James Stone and Exhibit, filed Dec. 2, 2014 .....	JA5099
Dkt. 6455-9, Declaration of Thomas Wisniewski and Exhibit, filed Dec. 2, 2014 .....	JA5125
Dkt. 6455-10, Declaration of Steven T. DeKosky and Exhibit, filed Dec. 2, 2014 .....	JA5176
Dkt. 6455-11, Declaration of Wayne Gordon and Exhibit, filed Dec. 2, 2014 .....	JA5230



Dkt. 6455-12, Supplemental Declaration of Eric Nitz, filed Dec. 2, 2014 .....	JA5270
Dkt. 6455-13, Exhibits 1-9 .....	JA5275
Dkt. 6455-14, Exhibits 10-18 .....	JA5365
Dkt. 6455-23, Exhibits 20-27 .....	JA5457
Dkt. 6461, Faneca Objectors’ Motion for Disclosure of Documents Relevant to Fairness of Settlement, filed Dec. 9, 2014 .....	JA5508
Dkt. 6462, Faneca Objectors’ Motion for Disclosure of Financial Relationships with Experts, filed Dec. 9, 2014.....	JA5515
Dkt. 6463, Amended Transcript of Nov. 19, 2014 Fairness Hearing, filed Dec. 11, 2014.....	JA5522
Dkt. 6469, Faneca Objectors’ Notice regarding: Fairness Hearing Slides, filed Dec. 22, 2014 .....	JA5774
Dkt. 6470, Faneca Objectors’ Notice regarding: Supplemental Authority, filed Dec. 23, 2014 .....	JA5814
Dkt. 6470-1, Memorandum Opinion and Order .....	JA5818
Dkt. 6479, Order Directing Settling Parties To Address Certain Issues by Feb. 13, 2015, filed Feb. 2, 2015 .....	JA5839
Dkt. 6481, Class Counsel and the NFL Parties’ Joint Submission regarding: Feb. 2, 2015 Order, filed Feb. 13, 2015 .....	JA5842
Dkt. 6481-1, Exhibit A, Class Action Settlement Agreement (As Amended).....	JA5853
Dkt. 6481-2, Exhibit B, Redline Class Action Settlement Agreement (As Amended) .....	JA6015
Dkt. 6503, Armstrong Objectors’ Supplemental Objection to the Amended Class Action Settlement, filed Apr. 13, 2015.....	JA6124
Dkt. 6508, Order Ruling on Various Motions, filed Apr. 21, 2015 .....	JA6129

Dkt. 6509, Memorandum Opinion regarding: Final Approval of Amended Settlement, filed Apr. 22, 2015 .....	JA6131
Dkt. 6510, Final Order and Judgment regarding: Final Settlement Approval, filed Apr. 22, 2015 .....	JA6263
Dkt. 6534, Amended Final Order and Judgment, filed May 8, 2015 .....	JA6270
Dkt. 6535, Order regarding: Amended Final Order, filed May 11, 2015 .....	JA6278
Dkt. 7070, Faneca Objectors’ Petition for an Award of Attorneys’ Fees, filed Jan. 11, 2017.....	JA6280
Dkt. 7070-1, Memorandum of Law in Support, filed Jan. 11, 2017 .....	JA6283
Dkt. 7070-2, Declaration of Steven Molo, filed Jan. 11, 2017 .....	JA6338
Dkt. 7151, Co-Lead Class Counsel’s Petition for an Award of Attorneys’ Fees, filed Feb. 13, 2017 .....	JA6555
Dkt. 7151-1, Memorandum of Law in Support, filed Feb. 13, 2017 .....	JA6558
Dkt. 7151-2, Declaration of Christopher Seeger, filed Feb. 13, 2017 .....	JA6640
Dkt. 7151-6, Declaration of Levin Sedran & Berman, filed Feb. 13, 2017 .....	JA6723-1
Dkt. 7151-7, Declaration of Gene Locks, filed Feb. 13, 2017 .....	JA6724
Dkt. 7151-8, Declaration of Steven C. Marks, filed Feb. 13, 2017 .....	JA6755
Dkt. 7151-10, Declaration of Sol H. Weiss, filed Feb. 13, 2017.....	JA6785
Dkt. 7151-18, Exhibit O, Declaration of Samuel Issacharoff, filed Feb. 13, 2017 .....	JA6814

Dkt. 7151-27, Exhibit X, Declaration of Charles Zimmerman, filed Feb. 13, 2017 .....	JA6849
Dkt. 7151-28, Exhibit Y, Brian T. Fitzpatrick, <i>An Empirical Study of Class Action Settlements and Their Fee Awards</i> , JOURNAL OF EMPIRICAL LEGAL STUDIES (Dec. 2010), filed Feb. 13, 2017 .....	JA6883
Dkt. 7161, Miller Objector’s Opposition to Co-Lead Class Counsel’s Fee Petition, filed Feb. 17, 2017 .....	JA6920
Dkt. 7176, Alexander Objectors’ Motion for Entry of Case Management Order Governing Applications for Attorney Fees, filed Feb. 21, 2017 .....	JA6933
Dkt. 7228, Co-Lead Class Counsel’s Motion for Extension of Time To File Response/Reply Memorandum in Support of Their Fee Petition and To Set Coordinated Briefing Schedule, filed Feb. 28, 2017.....	JA6943
Dkt. 7229, Objector Miller’s Response in Opposition to Fee Applications and Co-Lead Class Counsel’s Motion To Set Coordinated Briefing Schedule, filed Mar. 1, 2017.....	JA6948
Dkt. 7230, Armstrong Objectors’ Petition for an Award of Attorneys’ Fees, filed Mar. 1, 2017 .....	JA6951
Dkt. 7231, Objector Miller’s Corrected Response in Opposition to Fee Applications and Co-Lead Class Counsel’s Motion To Set Coordinated Briefing Schedule, filed Mar. 1, 2017.....	JA6954
Dkt. 7232, Armstrong Objectors’ Memorandum of Law in Support of Petition for an Award of Attorneys’ Fees, filed Mar. 1, 2017.....	JA6957
Dkt. 7232-1, Exhibit A, Declaration of Richard L. Coffman in Support of the Armstrong Objectors’ Petition for Award of Attorneys’ Fees .....	JA6992
Dkt. 7232-2, Exhibit B, Declaration of Mitchell A. Toups in Support of the Armstrong Objectors’ Petition for Award of Attorneys’ Fees.....	JA6998

Dkt. 7232-3, Exhibit C, Declaration of the Webster Law Firm in Support of the Armstrong Objectors’ Petition for an Award of Attorneys’ Fees .....	JA7007
Dkt. 7232-4, Exhibit D, Declaration of the Warner Law Firm in Support of the Armstrong Objectors’ Petition for an Award of Attorneys’ Fees .....	JA7009
Dkt. 7233, Faneca Objectors’ Response to Motion regarding: Co-Lead Class Counsel’s Motion for Extension of Time, filed Mar 1, 2017 .....	JA7014
Dkt. 7237, Anderson Objector’s Supplemental Objection to Faneca Objector’s to Fee Petition, filed Mar. 1, 2017 .....	JA7017
Dkt. 7238, Order Granting Co-Lead Class Counsel’s Motion for Extension of Time, filed Mar. 2, 2017 .....	JA7022
Dkt. 7259, Stipulation and Proposed Order by NFL, Inc., NFL Properties LLC, Plaintiff(s), filed Mar. 8, 2017 .....	JA7023
Dkt. 7261, Order regarding: Co-Lead Class Counsel’s Fee Petition, filed Mar. 8, 2017 .....	JA7026
Dkt. 7324, Order Considering the Uncontested Motion of Co-Lead Class Counsel for Order in Aid of Implementation of the Settlement Program, filed Mar. 23, 2017 .....	JA7028
Dkt. 7344, Memorandum in Opposition to Co-Lead Class Counsel’s Petition for an Award of Attorneys’ Fees, filed Mar. 27, 2017 .....	JA7036
Dkt. 7346, Memorandum in Opposition to Co-Lead Class Counsel’s Petition for an Award of Attorneys’ Fees, filed Mar. 27, 2017 .....	JA7046
Dkt. 7350, Response Objection and Memorandum in Opposition to Co-Lead Counsel’s Petition for an Award of Attorneys’ Fees, filed Mar. 27, 2017 .....	JA7059
Dkt. 7354, Aldridge Objectors’ Objections regarding: Co-Lead Class Counsel’s Application for an Award of Attorneys’ Fees, filed Mar. 27, 2017 .....	JA7073

Dkt. 7355, Aldridge Objectors’ Objections regarding: Co-Lead Class Counsel’s Application for an Award of Attorneys’ Fees, filed Mar. 27, 2017.....	JA7076
Dkt. 7356, Certain Plaintiffs’ Response in Opposition to Petition for Adoption of Set-Aside of Five Percent of Each Monetary Award and Derivative Claimant Award, filed Mar. 27, 2017 .....	JA7145
Dkt. 7360, Objection by Plaintiff(s) to Request for Attorneys’ Fees and Holdback, filed Mar. 27, 2017 .....	JA7150
Dkt. 7363, Notice of Joinder in Estate of Kevin Turner’s Response and Limited Opposition to Co-Lead Counsel’s Petition for an Award of Attorneys’ Fees, filed Mar. 27, 2017.....	JA7160
Dkt. 7364, Application/Petition of Objectors Preston and Katherine Jones for Award of Attorneys’ Fees, filed Mar. 27, 2017 .....	JA7167
Dkt. 7366, Faneca Objectors’ Preliminary Response in Support regarding: Petition for an Award of Attorney Fees and in Response to Dkts. 7151, 7161, 7230 and 7237, filed Mar. 27, 2017 .....	JA7170
Dkt. 7366-1, Exhibit A, Declaration of Joseph Floyd.....	JA7188
Dkt. 7366-2, Exhibit B, Armstrong Objectors’ Memorandum of Law.....	JA7223
Dkt. 7366-3, Exhibit C, Revised Summary of Expenses .....	JA7259
Dkt. 7367, Plaintiffs’ Joinder to Objections regarding: Co-Lead Counsel’s Petition for an Award of Attorneys’ Fees, filed Mar. 27, 2017 .....	JA7261
Dkt. 7370, Anderson Objector’s Second Supplemental Notice of Fee Objections, filed Mar. 27, 2017 .....	JA7264
Dkt. 7373, Plaintiffs’ Objections to Co-Lead Class Counsel’s Request for Five Percent Set Aside, filed Mar. 27, 2017 .....	JA7269
Dkt. 7375, Plaintiffs’ Notice of Joinder in Objections to Co-Lead Class Counsel’s Petition for Fees, Reimbursements, and Adoption of Set-Aside Award, filed Mar. 28, 2017.....	JA7275

Dkt. 7403, Order Granting Deandra Cobb’s Motion To Accept Objection to Five Percent Set-Aside File, filed Mar. 29, 2017 .....	JA7277
Dkt. 7404, Plaintiffs’ Response Objection regarding: Co-Lead Class Counsel’s Petition for Five Percent Set-Aside, filed Mar. 29, 2017 .....	JA7278
Dkt. 7409, Plaintiffs’ Motion for Extension of Time To File Answer, filed Mar. 29, 2017.....	JA7287
Dkt. 7446, Order That Pursuant to Federal Rules of Civil Procedure 72b Referring All Petitions for Individual Attorney' Liens, filed Apr. 4, 2017 .....	JA7289
Dkt. 7453, Order Granting Motion To Accept Joinder in Objections to Co-Lead Class Counsel’s Petition for Fees, filed Apr. 6, 2017 .....	JA7290
Dkt. 7463, Response in Opposition regarding: Motion for Joinder, filed Apr. 10, 2017 .....	JA7291
Dkt. 7464, Co-Lead Class Counsel’s Memorandum in Support regarding: Fee Petition, filed Apr. 10, 2017 .....	JA7308
Dkt. 7464-1, Supplemental Seeger Declaration, filed Apr. 10, 2017 .....	JA7385
Dkt. 7464-2, Exhibit Z, Declaration of Bradford R. Sohn .....	JA7396
Dkt. 7464-3, Exhibit AA, Petition to Appeal .....	JA7404
Dkt. 7464-4, Exhibit BB, Reply in Support .....	JA7437
Dkt. 7464-5, Exhibit CC, Corrected Opening Brief.....	JA7456
Dkt. 7464-6, Exhibit DD, Appellants’ Reply Brief.....	JA7529
Dkt. 7464-7, Exhibit EE, Class Opposition to Motion for Judicial Notice.....	JA7558
Dkt. 7464-8, Exhibit FF, Appellants’ Opposition to Motion to Expedite Appeals .....	JA7570
Dkt. 7464-9, Exhibit GG, Petition for a Writ of Certiorari .....	JA7574
Dkt. 7464-10, Exhibit HH, Petitioner’s Reply Brief.....	JA7615

Dkt. 7464-11, Exhibit II, U.S. Supreme Court Docket for <i>Armstrong v. NFL</i> .....	JA7630
Dkt. 7464-12, Exhibit JJ, An Updated Analysis of the NFL Concussion Settlement.....	JA7635
Dkt 7464-13, Exhibit KK, Declaration of Orran. L. Brown, Sr.....	JA7733
Dkt. 7533, Aldridge Objectors’ Objections regarding: Co-Lead Class Counsel’s Omnibus Reply, filed Apr. 21, 2017.....	JA7738
Dkt. 7534, Aldridge Objectors’ Motion for Leave To Serve Fee- Petition Discovery, filed Apr. 21, 2017 .....	JA7750
Dkt. 7550, Faneca Objectors’ Reply to Response to Motion for Attorney Fees, filed Apr. 25, 2017 .....	JA7756
Dkt 7550-1, Expert Declaration of Joseph J. Floyd, filed Apr. 25, 2017 .....	JA7776
Dkt. 7555, Reply in Support regarding: Jones Objectors’ Fee Petition, filed Apr. 26, 2017 .....	JA7785
Dkt. 7605, Co-Lead Class Counsel’s Motion To Strike Aldridge Objectors’ Objections as Unauthorized Sur-Reply, filed May 5, 2017.....	JA7790
Dkt. 7606, Co-Lead Class Counsel’s Memorandum of Law regarding: Aldridge Objectors’ Motion for Discovery and Objections as Unauthorized Sur-Reply, filed May 5, 2017.....	JA7793
Dkt. 7608, Armstrong Objectors’ Reply regarding: Their Attorneys’ Fee Petition, filed May 5, 2017.....	JA7820
Dkt. 7621, Mitnick Law Office’s Brief and Statement of Issues in Support of Request for Review of Objectors’ Fee Petition, filed May 9, 2017 .....	JA7828
Dkt. 7626, Aldridge Objectors’ Response in Opposition regarding: Co-Lead Class Counsel’s Motion To Strike Aldridge Objectors’ Objections as Unauthorized Sur-Reply, filed May 12, 2017.....	JA7844

Dkt. 7627, Aldridge Objectors’ Memorandum of Law regarding: Co-Lead Class Counsel’s Motion To Strike Aldridge Objectors’ Objections as Unauthorized Sur-Reply, filed May 12, 2017 .....	JA7847
Dkt. 7708, Faneca Objectors’ Reply to Response to Motion regarding: Faneca Objectors’ Motion for Attorney Fees and Mitnick Law Office’s Brief and Statement of Issues, filed May 18, 2017 .....	JA7856
Dkt. 7710, Co-Lead Class Counsel’s Reply to Response to Motion regarding: Co-Lead Class Counsel’s Motion To Strike Aldridge Objectors’ Objections as Unauthorized Sur-Reply, filed May 19, 2017 .....	JA7863
Dkt. 8310, Order To Show Cause regarding: Fees and Expenses, filed Aug. 23, 2017 .....	JA7872
Dkt. 8327, Co-Class Counsel’s Response to Order To Show Cause and Request for Clarification and Extension of Time, filed Aug. 28, 2017 .....	JA7891
Dkt. 8330, Notice by Plaintiff(s) regarding: Co-Lead Class Counsel’s Fee Petition, filed Aug. 29, 2017 .....	JA7895
Dkt. 8350, Aldridge Objectors’ Response regarding: Aug. 23, 2017 Order, filed Aug. 31, 2017 .....	JA7898
Dkt. 8354, Co-Lead Class Counsel’s Response in Opposition regarding: Notice by Plaintiff(s) For Appointment of Magistrate, filed Sept. 5, 2017 .....	JA7909
Dkt. 8358, Order regarding: the Court’s Continuing and Exclusive Jurisdiction under Article XXVII of the Amended Class Action Settlement, filed Sept. 7, 2017 .....	JA7913
Dkt. 8364, Reply to Co-Lead Class Counsel’s Response to Request To Appoint Magistrate Judge, filed Sept. 11, 2017 .....	JA7916
Dkt. 8367, Order Directing the Filing of Declarations regarding: Proposed Fee Allocation, filed Sept. 12, 2017 .....	JA7920
Dkt. 8372, Notice regarding: Professor William B. Rubenstein’s Appointment as Advisor to Plaintiff’s Steering Committee, filed Sept. 13, 2017 .....	JA7921



Dkt. 8376, Order Appointing Professor Rubenstein as an Expert Witness on Attorneys’ Fees, filed Sept. 14, 2017.....	JA7923
Dkt. 8395, Aldridge Objectors’ First Supplement in Support of Objections, filed Sept. 20, 2017.....	JA7926
Dkt. 8396, Aldridge Objectors’ Motion To Compel Compliance with Case Management Order No. 5, filed Sept. 20, 2017 .....	JA7931
Dkt. 8440, Co-Lead Class Counsel’s Response in Opposition regarding: Aldridge Objectors’ Motion To Compel, filed Oct. 4, 2017.....	JA7933
Dkt. 8447, Seeger Declaration regarding: Proposed Fee Allocation Order, filed Oct. 10, 2017 .....	JA7943
Dkt. 8447-1, Exhibit to Declaration of Christopher A. Seeger in Support of Proposed Allocation .....	JA7965
Dkt. 8447-2, Declaration of Brian T. Fitzpatrick .....	JA7967
Dkt. 8448, Order Directing Filing of Counter-Declarations regarding: Attorneys’ Fees, filed Oct. 12, 2017 .....	JA7980
Dkt. 8449, Aldridge Objectors’ Reply to Co-Lead Class Counsel’s Response to Their Motion To Compel Compliance with Case Management Order No. 5, filed Oct. 12, 2017 .....	JA7981
Dkt. 8470, Co-Lead Class Counsel’s Motion for Order Directing the Claims Administrator To Withhold Any Portions of Class Member Monetary Awards, filed Oct. 23, 2017 .....	JA7987
Dkt. 8532, Armstrong Objectors’ Response to Class Counsel’s Proposed Allocation of Common Benefit Attorneys’ Fees, filed Oct. 25, 2017.....	JA7992
Dkt. 8556, Counter-Declaration of Jason E. Luckasevic regarding: Fee Allocation, filed Oct. 26, 2017.....	JA7996
Dkt. 8653, Declaration of Craig R. Mitnick regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8005

Dkt. 8701, Co-Lead Class Counsel Anapol Weiss’s Proposed Alternative Methodology for Fee Allocation, filed Oct. 27, 2017 .....	JA8020
Dkt. 8709, Declaration of Gene Locks, Class Counsel, regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8051
Dkt. 8719, Counter- Declaration of Thomas V. Girardi regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8086
Dkt. 8720, Declaration of Anthony Tarricone in Opposition regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8095
Dkt. 8720-1, Exhibit to Declaration of Anthony Tarricone .....	JA8107
Dkt. 8720-2, Kreindler & Kreindler LLP Opposition to Co-Lead Counsel’s Petition for an Award of Common Benefit Attorneys’ Fees .....	JA8109
Dkt. 8721, Declaration of Michael L. McGlamry regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8122
Dkt. 8722, Declaration of Charles S. Zimmerman regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8141
Dkt. 8723, Response by Neurocognitive Football Lawyers and The Yerid Law Firm In Support of Seeger Declaration regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8158
Dkt. 8724, Declaration of Derriel C. McCorvey regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8167
Dkt. 8725, Declaration of Lance H. Lubel regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8179
Dkt. 8726, Faneca Objectors’ Response in Opposition to Seeger Declaration regarding: Fee Allocation, filed Oct. 27, 2017 .....	JA8192
Dkt. 8727, Declaration of James T. Capretz regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8206
Dkt. 8728, Declaration of Steven C. Marks regarding: Fee Allocation, filed Oct. 27, 2017.....	JA8212

Dkt. 8900, Order Directing Filing of Omnibus Replies regarding: Counter-Declarations, filed Nov. 7, 2017 .....	JA8215
Dkt. 8915, Notice by Class Counsel regarding: Settlement Implementation, filed Nov. 10, 2017 .....	JA8216
Dkt. 8917, Notice by Mitnick Law Office, filed Nov. 10, 2017 .....	JA8218
Dkt. 8929, Order regarding: Extension for Omnibus Reply, filed Nov. 17, 2017 .....	JA8219
Dkt. 8934, Co-Lead Class Counsel’s Omnibus Reply to Responses, Objections, and Counter-Declarations regarding: Fee Petition, filed Nov. 17, 2017 .....	JA8221
Dkt. 8934-1, Supplemental Declaration of Brian T. Fitzpatrick, filed Nov. 17, 2017 .....	JA8267
Dkt. 8937, Plaintiffs’ Motion for Leave To File Sur-Reply Counter- Declaration of Jason E. Luckasevic regarding: Fee Allocation, filed Nov. 21, 2017 .....	JA8270
Dkt. 8945, Zimmerman Reed LLP’s Motion for Leave To File a Sur- Reply Declaration regarding: Fee Allocation, filed Nov. 22, 2017 .....	JA8274
Dkt. 8963, Pope McGlamry, P.C.’s Motion for Leave To File Sur- Reply Declaration regarding: Fee Allocation, filed Nov. 28, 2017 .....	JA8276
Dkt. 9508, Order Denying Motions for Leave To File Sur-Reply Declaration, filed Dec. 5, 2017 .....	JA8279
Dkt. 9510, Order Denying the Aldridge Objectors’ Motion To Compel Compliance with Case Management Order No. 5, filed Dec. 5, 2017 .....	JA8280
Dkt. 9526, Export Report of Professor William B. Rubenstein, filed Dec. 11, 2017 .....	JA8281
Dkt. 9527, Receipt of Expert’s Report and Notice regarding: Rubenstein Report Responses, filed Dec. 11, 2017 .....	JA8376

Dkt. 9536, Aldridge Objectors’ Motion for Reconsideration regarding: Extension of Time for Rubenstein Report Responses Notice, filed Dec. 19, 2017 .....	JA8378
Dkt. 9545, Response by the Locks Law Firm to Rubenstein Report, filed Jan. 2, 2018 .....	JA8381
Dkt. 9547, Response by Goldberg, Persky and White, P.C.; Girardi Keese; and Russomanno & Borrello to Rubenstein Report, filed Jan. 3, 2018 .....	JA8392
Dkt. 9548, Response by Anapol Weiss to Rubenstein Report, filed Jan. 3, 2018 .....	JA8399
Dkt. 9549, Response by the Mokaram Law Firm; The Buckley Law Group; and The Stern Law Group to Rubenstein Report, filed Jan. 3, 2018 .....	JA8402
Dkt. 9550, Response and Declaration of Robert A. Stein to Rubenstein Report, filed Jan. 3, 2018 .....	JA8415
Dkt. 9551, Response by The Yerrid Law Firm and Neurocognitive Football Lawyers to Rubenstein Report, filed Jan. 3, 2018.....	JA8420
Dkt. 9552, Response by Co-Lead Class Counsel to Rubenstein Report, filed Jan. 3, 2018 .....	JA8431
Dkt. 9552-1, Declaration of Christopher A. Seeger .....	JA8443
Dkt. 9553, Zimmerman Reed LLP’s Joinder to the Response of the Locks Law Firm to the Rubenstein Report, filed Jan. 3, 2018 .....	JA8455
Dkt. 9554, Response by the Aldridge Objectors to Rubenstein Report, filed Jan. 3, 2018 .....	JA8457
Dkt. 9555, Notice of Joinder by Robins Cloud, LLP regarding: Responses to Rubenstein Report, filed Jan. 3, 2018.....	JA8469
Dkt. 9556, Response by Class Counsel Podhurst Orseck, P.A. to Rubenstein Report, filed Jan. 3, 2018 .....	JA8471

Dkt. 9561, Order regarding: Appointment of Dennis R. Suplee to Represent <i>pro se</i> Settlement Class Members Where There Has Been a Demonstrated Need for Legal Counsel, filed January 8, 2018. ....	JA8476
Dkt. 9571, Reply of Professor William B. Rubenstein to Responses to Expert Report, filed Jan. 19, 2018 .....	JA8477
Dkt. 9576, Order Permitting Sur-Reply Filings in Response to Professor Rubenstein’s Reply, filed Jan. 23, 2018 .....	JA8493
Dkt. 9577, Mitnick Law Office’s First Motion To Compel, filed Jan 26, 2018 .....	JA8494
Dkt. 9581, Memorandum of Law regarding: Sur-Reply of NFL, Inc., and NFL Properties LLC to Rubenstein’s Reply to Responses, filed Jan. 30, 2018 .....	JA8498
Dkt. 9587, Notice by Plaintiff(s) regarding: Sur-Reply of X1Law to Rubenstein’s Reply to Responses, filed Jan. 30, 2018 .....	JA8500
Dkt. 9588, Notice by Plaintiff(s) regarding: Aldridge Objectors’ Sur-Reply to Rubenstein’s Reply to Responses, filed Jan. 30, 2018 .....	JA8506
Dkt. 9753-1, Exhibit A, Curriculum Vitae of Brian R. Ott, M.D. ....	JA8513
Dkt. 9753-2, Exhibit B, Curriculum Vitae of Mary Ellen Quiceno, M.D., F.A.A.N. ....	JA8564
Dkt. 9757, Order regarding: Joint Application by Co-Lead Class Counsel and Counsel for the NFL and NFL Properties, LLC for Appointment of Two Appeals Advisory Panel Members and Removal of One Appeals Advisory Panel Member, filed Mar. 6, 2018.....	JA8577
Dkt. 9760, Order Adopting Rules Governing Attorney's Liens, filed Mar. 6, 2018 .....	JA8581
Dkt. 9786, Class Counsel’s Motion To Appoint the Locks Law Firm as Administrative Class Counsel, filed Mar. 20, 2018 .....	JA8603
Dkt. 9813, Pope McGlamry P.C.’s Motion for Joinder regarding: Administrative Class Counsel, filed Mar. 26, 2018.....	JA8628

Dkt. 9816, Motion for Joinder by Locks Law Firm regarding: Hearing To Correct Fundamental Implementation Failures in Claims Processing, filed Mar. 26, 2018 .....	JA8632
Dkt. 9819, Motion for Joinder by Provost Umphrey Law Firm, LLP regarding: Administrative Class Counsel, filed Mar. 27, 2018 .....	JA8635
Dkt. 9820, Zimmerman Reed LLP’s Joinder in Request for Action To Correct Implementation Failures in the Claims and BAP Administration, filed Mar. 27, 2018 .....	JA8638
Dkt. 9821, Motion for Joinder by McCorvey Law, LLC regarding: Administrative Class Counsel, filed Mar. 27, 2018.....	JA8650
Dkt. 9824, Motion for Joinder by Lieff Cabraser Heinmann & Bernstein, LLP regarding: Hearing Request on Claims Settlement Process, filed Mar. 28, 2018 .....	JA8654
Dkt. 9829, Motion for Joinder by Law Office of Hakimi & Shahriari regarding: Administrative Class Counsel, filed Mar. 28, 2018 .....	JA8659
Dkt. 9830, Motion for Joinder by Casey Gerry regarding: Administrative Class Counsel, filed Mar. 28, 2018.....	JA8664
Dkt. 9831, Motion for Joinder by Podhurst Orseck regarding: Administrative Class Counsel, filed Mar. 29, 2018.....	JA8667
Dkt. 9833, Order regarding: Hearing as to Allocation, filed Mar. 28, 2018.....	JA8671
Dkt. 9834, Motion for Joinder by Mitnick Law Office regarding: Administrative Class Counsel, filed Mar. 29, 2018.....	JA8677
Dkt. 9835, Co-Lead Class Counsel’s Letter regarding: Administrative Class Counsel, filed Mar. 29, 2018.....	JA8683
Dkt. 9836, Motion for Joinder by Wyatt Law regarding: Administrative Class Counsel, filed Mar. 29, 2018.....	JA8685
Dkt. 9837, Motion for Joinder by Robin Clouds LLP regarding: Administrative Class Counsel, filed Mar. 29, 2018.....	JA8688

Dkt. 9838, Notice by the Locks Law Firm In Response to Request for Deadline for Joinders and Date of Response Motion, filed Mar. 29, 2018.....	JA8690
Dkt. 9839, Motion for Joinder by Anapol Weiss regarding: Hearing Request on Claims Settlement Process, filed Mar. 29, 2018.....	JA8691
Dkt. 9840, Notice by the Locks Law Firm in Response to Request for Deadline for Joinders and Date of Response to Motion, filed Mar. 30, 2018.....	JA8694
Dkt. 9842, Motion for Joinder by Kreindler & Kreindler LLP regarding: Administrative Class Counsel, filed Mar. 30, 2018 .....	JA8696
Dkt. 9843, Motion for Joinder by the Yerrid Law Firm and Neurocognitive Football Lawyers, filed Mar. 30, 2018 .....	JA8700
Dkt. 9845, Order Directing Filing of Motions for Joinder, filed Apr. 2, 2018 .....	JA8720
Dkt. 9847, Notice by Robins Cloud LLP of Withdrawal of Joinder regarding: Administrative Class Counsel, filed Apr. 2, 2018 .....	JA8722
Dkt. 9848, Motion for Joinder by the Locks Law Firm to Anapol Weiss’s Motion To Compel regarding: Reimbursement of Common Benefit Expenses and Establishment of Education Fund, filed Apr. 3, 2018 .....	JA8724
Dkt. 9851, Notice by Lieff Cabraser Heinmann & Bernstein LLP of Withdrawal of Joinder regarding: Administrative Class Counsel, filed Apr. 3, 2018 .....	JA8730
Dkt. 9852, Co-Lead Class Counsel’s Response to Motion for Joinder Seeking Court Intervention, filed Apr. 3, 2018 .....	JA8733
Dkt. 9853, Motion for Joinder by Hagen Roskopf LLC regarding: Administrative Class Counsel, filed Apr. 3, 2018 .....	JA8736
Dkt. 9854, Motion for Joinder by Smith Stallworth PA regarding: Administrative Class Counsel, filed Apr. 3, 2018 .....	JA8741

Dkt. 9855, Motion for Joinder by Berkowitz and Hanna LLC regarding: Administrative Class Counsel and For a Hearing, filed Apr. 3, 2018 .....	JA8743
Dkt. 9856, Motion for Joinder by Aldridge Objectors’ regarding: Administrative Class Counsel, filed Apr. 3, 2018 .....	JA8750
Dkt. 9856-1, Memorandum in Support of Movants’ Joinder in the Motion of Class Counsel, the Locks Law Firm, for Appointment of Administrative Class Counsel.....	JA8752
Dkt. 9856-2, Exhibit A, Email correspondence dated Sept. 20, 2018 .....	JA8761
Dkt. 9856-3, Exhibit B, Email correspondence dated Oct. 19, 2017 .....	JA8762
Dkt. 9856-4, Exhibit C, Email correspondence dated Feb. 19, 2018 .....	JA8764
Dkt. 9860, Memorandum of Hon. Anita Brody Granting Co-lead Counsel’s Petition for Award of Attorneys’ Fees and Reimbursement of Expenses, filed Apr. 5, 2018.....	JA8766
Dkt. 9862, Memorandum Opinion regarding: Attorneys’ Fees, filed Apr. 5, 2018 .....	JA8786
Dkt. 9865, Co-Lead Class Counsel’s Response to Motion regarding: Cost Reimbursement, filed Apr. 5, 2018 .....	JA8796
Dkt. 9870, Claims Administrator’s Response to Locks Law Firm’s Motion for Partial Joinder, filed Apr. 9, 2018 .....	JA8802
Dkt. 9874, Co-Lead Class Counsel’s Notice regarding: Class Counsel’s Attorneys’ Fee Award, filed Apr. 11, 2018 .....	JA8837
Dkt. 9881, Co-Lead Class Counsel’s Response to Locks Law Firm’s Motion for Partial Joinder, filed Apr. 13, 2018 .....	JA8839
Dkt. 9885, Co-Lead Class Counsel’s Response in Opposition regarding: Administrative Class Counsel, filed Apr. 13, 2018 .....	JA8847
Dkt. 9890, Order Denying the Motion of Class Counsel Locks Law Firm for Appointment of Administrative Class Counsel, filed Apr. 18, 2018 .....	JA8884



Dkt. 9920, Tarricone Declaration regarding: Mar. 28, 2018 Order, filed May 1, 2018 .....	JA8886
Dkt. 9921, Locks Law Firm’s Motion for Reconsideration of the Denial of the Locks Law Firm’s Motion for Appointment of Administrative Class Counsel, filed May 1, 2018 .....	JA8891
Dkt. 9926, Aldridge Objectors’ Motion for New Trial, filed May 2, 2018 .....	JA8906
Dkt. 9955, Order Directing Firms Seeking Attorneys’ Fees To File Materials, filed May 3, 2018 .....	JA8908
Dkt. 9970, Amended Order for Hearing, filed May 7, 2018 .....	JA8910
Dkt. 9985, Order Denying the Motion for Entry of Case Management Order Governing Applications for Attorneys’ Fees; Cost Reimbursements; and Further Fee Set-Aside, filed May 14, 2018 .....	JA8912
Dkt. 9990, Declaration by Mitnick Law Office regarding: Independent Fee Petition, filed May 14, 2018 .....	JA8913
Dkt. 9993, Co-Lead Class Counsel’s Response in Opposition regarding: Motion for Reconsideration of Administrative Class Counsel, filed May 15, 2018 .....	JA8916
Dkt. 9995, Faneca Objectors’ Statement regarding: Improvements to Preliminarily-Approved Settlement, filed May 16, 2018 .....	JA8921
Dkt. 9996, Co-Lead Class Counsel’s Response in Opposition regarding: Motion for New Trial, filed May 16, 2018 .....	JA8925
Dkt. 10000, Co-Lead Class Counsel’s PowerPoint from May 15, 2018 Hearing, filed May 17, 2018 .....	JA8939
Dkt. 10001, Anapol Weiss’s Motion for Leave To File Supplemental Memorandum regarding: Allocation of Common Benefit Fees, filed May 17, 2018 .....	JA8954
Dkt. 10004, Order regarding: Hearing Concerning Attorneys’ Fees, filed May 21, 2018 .....	JA8961

Dkt. 10007, Order Denying Anapol Weiss’ Motion for Leave To File Supplemental Memorandum regarding: Allocation of Common Benefit Fees, filed May 21, 2018.....	JA8963
Dkt. 10016, Letter Brief by the Locks Law Firm, filed May 22, 2018.....	JA8964
Dkt. 10017, Co-Lead Class Counsel’s Response regarding: Locks Law Firm’s Letter Brief, filed May 23, 2018 .....	JA8968
Dkt. 10019, Explanation and Order of Judge Brody re Allocation of Attorneys’ Fees, filed May 24, 2018 .....	JA8971
Dkt. 10022, Aldridge Objectors’ Motion To Stay regarding: Attorneys’ Fees Allocation, filed May 25, 2018 .....	JA8998
Dkt. 10023, Order Finding as Moot Motion To Strike Class Counsel’s Sur-Reply regarding: Fee Allocation, filed May 29, 2018 .....	JA9000
Dkt. 10026, Co-Lead Class Counsel’s Response regarding: Mitnick Law Office’s Petition for Independent Award of Attorneys’ Fees, filed May 29, 2018 .....	JA9001
Dkt. 10031, Co-Lead Class Counsel’s Response in Opposition regarding: Aldridge Objectors’ Motion To Stay, filed May 31, 2018.....	JA9004
Dkt. 10039, Aldridge Objectors’ Reply to Response to Motion regarding: Motion To Stay, filed June 1, 2018 .....	JA9015
Dkt. 10073, The Locks Law Firm’s Motion for Reconsideration of the Court’s Explanation and Order, filed June 7, 2018 .....	JA9025
Dkt. 10085, Order Denying as Moot the Aldridge Objectors’ Motion To Reconsider Withdrawal of Fed. R. Evid. 706 Deposition, filed June 19, 2018 .....	JA9034
Dkt. 10086, Order Denying as Moot the Motion Requesting the Court To Direct the Relevant Parties To Negotiate on the Allocations of the Common Benefit Fund, filed June 19, 2018.....	JA9035
Dkt. 10091, Co-Lead Class Counsel’s Response in Opposition regarding: the Locks Law Firm’s Motion for Reconsideration, filed June 19, 2018 .....	JA9036

Dkt. 10096, Faneca Objectors’ Notice of Filing Hearing Slides, filed June 22, 2018 .....	JA9042
Dkt. 10105, Certified Copy of Order from the USCA, filed June 28, 2018 .....	JA9048
Dkt. 10119, Order Denying Motion for Reconsideration of the Denial of Locks Law Firm’s Motion for Appointment of Administrative Class Counsel, filed July 2, 2018.....	JA9049
Dkt. 10127, Order Denying Motion for Reconsideration of the Court's Explanation and Order ECF Nos. 10072 and 10073, filed July 10, 2018 .....	JA9051
Dkt. 10128, First Verified Petition of Co-Lead Class Counsel Christopher A. Seeger for an Award of Post-Effective Date Common Benefit Attorneys’ Fees and Costs, filed July 10, 2018 .....	JA9052
Dkt. 10134, Transcript of May 15, 2018 Hearing, filed July 13, 2018.....	JA9073
Dkt. 10145, Status Report of Co-Lead Class Counsel, filed July 18, 2018.....	JA9198
Dkt. 10165, Aldridge Objectors’ Objections regarding: Post-Effective Date Fees, filed July 24, 2018.....	JA9205
Dkt. 10165-1, Exhibit 1, Declaration of Christopher A. Seeger .....	JA9221
Dkt. 10165-2, Exhibit 2, Letter from Craig R. Mitnick to Judge Brody dated Apr. 16, 2018 .....	JA9224
Dkt. 10165-3, Text of Proposed Order .....	JA9229
Dkt. 10188, Notice of Appeal of Locks Law Firm from the May 24, 2108 Explanation and Order ECF No. 10019, filed August 2, 2018.....	JA9230
Dkt. 10261, Zimmerman Reed LLP’s Objection regarding: Post- Effective Date Fees, filed Sept. 18, 2018 .....	JA9233
Dkt. 10278, Declaration of Christopher A. Seeger regarding: Post- Effective Date Fees, filed Sept. 27, 2018 .....	JA9242

Dkt. 10283, Order Adopting Amended Rules Governing Attorneys' Liens, filed Oct. 3, 2018 .....	JA9248
Dkt. 10294, Order Adopting Amended Rules Governing Petitions for Deviation from the Fee Cap, filed Oct. 10, 2018.....	JA9272
Dkt. 10368, Report and Recommendation of Magistrate Judge Strawbridge, filed January 7, 2109 ..	JA9290
Dkt. 10374, Second Verified Petition of Co-Lead Class Counsel Seeger for Award of Post-Effective Date Common Benefit Attorneys Fees and Costs, filed January 10, 2109 .....	JA9383
Dkt. 10624, Order regarding: Vacating appointments of all Class Counsel, Co-Lead Class Counsel, and Subclass Counsel and Reappointing Christopher A. Seeger as Class Counsel, filed May, 24, 2019 .....	JA9402
Dkt. 10677, Report and Recommendation of Magistrate Strawbridge, filed June 20, 2109 .....	JA9404
Dkt. 10756-1, David Buckley, PLLC, Mokaram Law Firm and Stern Law Group's Petition to Establish Attorney's Lien, filed July 18, 2019 .....	JA9425
Dkt. 10767, Third Verified Petition of Class Counsel Seeger for Award of Post-Effective Date Common Benefit Attorneys Fees and Costs, filed July 25, 2109 .....	JA9428

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB  
MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Civil Action No. 2:14-cv-00029-AB

Plaintiffs,

v.

National Football League and  
NFL Properties, LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**FANCA OBJECTORS' PRELIMINARY RESPONSE IN SUPPORT OF  
THEIR PETITION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES<sup>1</sup>**

The work of the Faneca Objectors significantly enhanced the settlement. With a fee award at stake, others challenge the value of that effort, or seek to take credit for that work.

<sup>1</sup> This submission responds to: the Opposition to Co-Lead Class Counsel's Petition for an Award of Attorneys' Fees and Adoption of a Set-Aside of Each Monetary Award, and Opposition to [MoloLamken's] Fee Petition, filed by attorney John Pentz, Dkt. 7161; the Armstrong Objectors' Petition for an Award of Attorneys' Fees, filed by attorney Richard L. Coffman, Dkts. 7230, 7232; Curtis L. Anderson's Supplemental Objection to Class Counsel's Fee Petition, filed by attorney George W. Cochran, Dkt. 7237; and Co-Lead Class Counsel's Petition for an Award of Attorneys' Fees, Reimbursement of Costs and Expenses, Adoption of a Set-Aside of Five Percent of Each Monetary Award and Derivative Claimant Award, and Case Contribution Awards for Class Representatives, Dkt. 7151. The Faneca Objectors reserve the right to seek leave of the Court to file a reply in further support of their attorneys' fees petition to the extent any additional filing – including Co-Lead Class Counsel's April 10, 2017 response – addresses the Faneca Objectors' fee request.

The Faneca Objectors were the first class members to challenge the adequacy of compensation for CTE claims, and the potential conflict of interest between the class representatives and certain class members at risk of developing CTE in the future. They also identified deficiencies in the settlement's cap on the BAP Fund, the settlement's lack of Eligible Season credit for seasons played in NFL Europe, and the settlement's \$1,000 appeal fee that would preclude financially needy class members from filing meritorious appeals.

The Faneca Objectors submitted substantial evidence and extensive briefing. They tested the fairness of the settlement before this Court, before the Third Circuit, and in independent negotiations with the NFL. No other objector invested more time, or more aggressively – and effectively – pursued the interests of the class. Their advocacy secured over \$100 million of additional benefit to the class.

One group of objectors – the Armstrong Objectors – is now taking credit for that work and for the substantial benefit resulting from it. Throughout the case, their filings simply copied and summarized points the Faneca Objectors had already raised. Their fee petition, almost comically, is the latest example of that strategy – it is a near carbon copy of the petition submitted by the Faneca Objectors. Other objectors – led by Cleo Miller – question the value of the benefit secured by the Faneca Objectors' efforts, arguing that not all class members might take advantage of those benefits. But those objectors do not question class members' *entitlement* to the benefits of the improved settlement. That entitlement is valuable, and it is *that value* on which attorneys' fees to objectors are based.

**I. The Faneca Objectors' Advocacy Increased the Value of the Settlement by More Than \$100 Million**

The Faneca Objectors' fee petition provides a detailed explanation of how the enhancements for which they advocated increased the value of the Final Settlement by more than

\$100 million. That explanation relied on calculations and assumptions made by Class Counsel in valuing the settlement. Dkt. 7070-1 at 20-28 & nn.24-39.

As further support for the value of the enhancements attributable to their work, the Faneca Objectors have provided a declaration by Joseph J. Floyd, CPA, JD, CFE, CGMS, ABV (“Floyd Decl.,” attached as Exhibit A). Mr. Floyd and his firm, Floyd Advisory LLC, conducted a valuation analysis of the enhancements to the settlement that resulted from the Faneca Objectors’ advocacy. Using the “generally accepted valuation and finance methodology commonly referred to as ‘before and after,’” they summarized the settling parties’ valuation of the June 25, 2014 Revised Settlement and estimated the additional value created by the enhancements contained in the Final Settlement. Floyd Decl. 5. Their conclusion is that the value of those enhancements is as much as \$120.4 million:

- Elimination of the cap on the Baseline Assessment Program (“BAP”) Fund for baseline examinations: \$29.6 million, Floyd Decl. 3, 5-7 & Ex. B; *see* Dkt. 7070-1 at 21-22;
- Eligible Season credit for NFL Europe: \$35.3 million, Floyd Decl. 3, 7-10 & Exs. B, C; *see* Dkt. 7070-1 at 22-26;
- Extension of Death with CTE timeframe: \$44.6 million, Floyd Decl. 3, 10-11 & Ex. C; *see* Dkt. 7070-1 at 26-27; and
- Hardship waiver for appeal fee: \$10.9 million, Floyd Decl. 3, 11-12 & Ex. C; *see* Dkt. 7070-1 at 27-28.

Those enhancements – extracted on top of an already generous settlement agreement – did not come easily.

The Faneca Objectors recognized the deficiencies of the Initial Settlement as soon as it was made public. *See* Dkt. 7070-2 ¶¶ 8-10, 13. Accordingly, they sought to participate in the case from the early stages of the approval process – when advocacy in favor of improvements to the settlement would have the most impact. When other objectors did nothing, the Faneca

Objectors filed a motion to intervene, Dkt. 7070-1 at 8-9; opposed Co-Lead Class Counsel's motion for preliminary approval, *id.* at 9-10; and sought early appellate review of the preliminary approval order, *id.* at 10-11. The Faneca Objectors pressed the settling parties for discovery and disclosure of information, *id.* at 11, and they filed a robust objection and supplemental brief supported by declarations from nearly a dozen leading experts and hundreds of pages of scientific and other evidence, *id.* at 12-17.<sup>2</sup> They took the lead at the fairness hearing, arguing all but one of the points later raised in the Court's order identifying potential improvements to the settlement. *Id.* at 14-15. Even after securing the improvements that resulted in the Final Settlement, counsel for the Faneca Objectors negotiated directly with the NFL, hoping to secure further improvements that would address their remaining concerns. *Id.* at 18-19.

No other objector participated in the case in any significant way until *after* the Faneca Objectors had already raised the main issues. Dkt. 7070-1 at 13, 37. And no other objector went so far to test the fairness of this settlement. It therefore is clear that it was the Faneca Objectors – because of the arguments they raised and the evidence they submitted – who “transform[ed] the settlement hearing into a truly adversarial proceeding.” *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 395 (D.N.J. 2012) (quotation marks omitted) (awarding objectors' counsel fees).

## **II. The Armstrong Objectors Wrongly Claim Credit for the Work of the Faneca Objectors**

To be sure, class members in addition to the Faneca Objectors objected to the Revised Settlement. However, for the most part, those objectors parroted the arguments of, and cited the

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<sup>2</sup> Because the Faneca Objectors submitted their initial objection and evidence over a week before the objection deadline, other objectors repeated the Faneca Objectors' arguments and relied upon the evidence the Faneca Objectors had submitted. *See* Dkt. 7070-1 at 19 & n.22.



evidence submitted by, the Faneca Objectors. The Armstrong Objectors now try to take credit for the work of the Faneca Objectors, but their very attempt undercuts their claim.

As the Armstrong Objectors did throughout the proceedings in this Court and in the Third Circuit following approval of the Final Settlement, they largely copy the work of the Faneca Objectors. In their Memorandum of Law in Support of Their Petition for an Award of Attorneys' Fees, they argue that, in fact, the work was their own and entitles them to a fee. *See* Dkt. 7232. But incredibly, **over 50%** of their filing copies – **word for word** – the Faneca Objectors' fee petition. And much of what the Armstrong Objectors do not copy word for word, they nonetheless copy in substance. Attached as Exhibit B is a document that highlights the portions of the Armstrong Objectors' fee petition that **were directly lifted from the Faneca Objectors' fee petition**.

The Faneca Objectors take no position on whether the Armstrong Objectors, or any other objectors, are entitled to a fee award. Courts routinely deny requests for payment of attorneys' fees from objectors whose arguments are duplicative or insubstantial. *See, e.g., McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 664 (E.D. Pa. 2015) (denying fee petition by objector who failed to show "what he did that was not duplicative of [another objector's] actions").<sup>3</sup>

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<sup>3</sup> *See also Rodriguez v. Disner*, 688 F.3d 645, 658-59 (9th Cir. 2012) (affirming denial of fees to objectors who merely "filed briefs capitalizing on arguments already made by [other] [o]bjectors"); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288-89 (7th Cir. 2002) (finding a "compelling ground" for denying fees to objectors whose points had been "vigorously" raised by other lawyers so that "the objectors added nothing"); *Rose v. Bank of Am. Corp.*, No. 5:11-cv-02390-EJD, 2015 WL 2379562, at \*1-2 (N.D. Cal. May 18, 2015) (denying fees to objectors who made no unique arguments that influenced the court or the settlement); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973-74 (E.D. Tex. 2000) (denying fees to objectors who "lodg[ed] generic, unhelpful protests," but awarding substantial fees to objectors who "conferred a substantial benefit on the class"); *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 962 F. Supp. 572, 593 n.50 (D.N.J. 1997) (refusing to award fees to objectors whose arguments "were not novel to [the] Court, as their objections were also raised by" other litigants), *vacated in part on other grounds*, 148 F.3d 283 (3d Cir. 1998); *cf. In re Cendant Corp. Sec. Litig.*, 404 F.3d

Objectors who raise no significant “novel factual or legal argument” and instead make “a number of similar arguments as raised in . . . other objections” typically are not entitled to a fee award. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at \*16 (N.D. Cal. Apr. 3, 2013) (denying objectors’ fee request). However, given the Armstrong Objectors’ revisionist history and their attack on the Faneca Objectors’ fee petition, it is important to set the record straight.

Months before the Armstrong Objectors filed their objection on September 3, 2014, the Faneca Objectors had identified the core deficiencies in the Settlement Agreement and had begun advocating to correct them. *See* Dkt. 6533. On May 5, 2014, the Faneca Objectors filed their motion to intervene, arguing that their interests were not adequately represented by the class representatives because “notwithstanding the widespread prevalence of CTE among NFL retirees, the settlement provided *no compensation* to players with CTE who die after preliminary approval of the settlement.” Dkt. 6019-1 at 16-17. The Faneca Objectors raised and expanded upon that argument in their opposition to preliminary approval of the Revised Settlement, filed on July 2, 2014, *see* Dkt. 6082 at 9-11, 20-26, and in their petition to appeal under Rule 23(f), Pet. to Appeal at 9-14, No. 14-8103 (3d Cir. filed July 21, 2014).

Prior to preliminary approval, the Faneca Objectors also complained that, while the “Revised Settlement does not cap total compensation for [Qualifying Diagnoses], . . . it retains the \$75 million cap on the BAP Fund.” Dkt. 6082 at 15. And, noting that many former NFL players suffer financial hardship in retirement, the Faneca Objectors argued that the “appeal fee will discourage many retired players from challenging adverse claim determinations.” *Id.* at 33 n.43. Thus, well before the Armstrong Objectors filed their objection, the Faneca Objectors had

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173, 197 (3d Cir. 2005) (explaining in a different context that “duplicative” attorney work “will not be entitled to compensation”).

identified and raised with the Court each of the issues for which the Armstrong Objectors now claim credit.<sup>4</sup>

Without acknowledging that the Faneca Objectors first presented these issues in their motion to intervene, their opposition to preliminary approval, and their Rule 23(f) petition to appeal, the Armstrong Objectors deride those efforts as “wasting the time and resources of the Court, the appellate court, and the Parties.” Dkt. 7232 at 6. But they were not a waste. They sought to correct the deficiencies in the settlement – which were significantly addressed later – early on. As the Faneca Objectors explained, there was “a real human cost” to delay. Pet. to Appeal at 20, No. 14-8103 (3d Cir. filed July 21, 2014). Significantly – unlike the petitions for rehearing and certiorari filed by other objectors – ***none of the Faneca Objectors’ pre-fairness hearing filings delayed consideration or implementation of the settlement by a single day.*** To the contrary, the Faneca Objectors repeatedly pushed for expedited proceedings, filing papers ahead of deadlines.<sup>5</sup> They recognized that the injured class members should not have to wait for the relief that a fair, adequate, and reasonable settlement would bring. Dkt. 7070-1 at 5, 11-12, 20.<sup>6</sup>

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<sup>4</sup> Objector Miller, represented by Attorney John Pentz, also takes credit for the expanded Death with CTE benefit, saying that he “sought to extend the deadline for Death with CTE indefinitely.” Dkt. 7161 at 8. But the Miller Objection simply piggy-backed on the Faneca Objectors’ efforts, admittedly and expressly “adopt[ing] and incorporat[ing]” the objection filed by the Faneca Objectors. Dkt. 6213 at 1. Its arguments regarding CTE simply summarized the arguments more fully expressed in the Faneca Objectors’ submissions. *Id.* at 2-5.

<sup>5</sup> When other objectors opposed Co-Lead Class Counsel’s request for expedited briefing in the Third Circuit, the Faneca Objectors supported it. *Compare, e.g.,* Armstrong Appellants’ Opposition to Class Plaintiffs-Appellees’ Motion To Expedite Appeals, No. 15-2272 (3d Cir. filed June 1, 2015), *with* Faneca Objectors-Appellants’ Notification of Consent to Class Plaintiffs-Appellees’ Motion To Consolidate and To Expedite Appeals, No. 15-2304 (3d Cir. filed May 27, 2015).

<sup>6</sup> The Armstrong Objectors now characterize the delay occasioned by their strategy as a “benefit” to the class. *See* Dkt. 7232 at 13-15. During the period of that delay, they argue, class members were free to obtain a qualifying diagnosis from a doctor of their choosing, rather than a qualified

In addition to raising each issue with the Court *before* the Armstrong Objectors, the Faneca Objectors presented the issues with far more depth of analysis and evidentiary support than the Armstrong Objectors – or any other objector. It was the Faneca Objectors who performed the substantial work of:

- Identifying credentialed experts and facilitating their participation in the litigation, *see* Dkts. 6201-16, 6232-1, 6455-1 to 6455-11;
- Researching the scientific literature for evidence supporting the objectors’ arguments, and submitting that evidence to the Court, *see* Dkts. 6201-1 to 6201-15, 6455-12 to 6455-23;
- Seeking discovery and information from the settling parties to further inform class members’ understanding of the settlement, *see, e.g.*, Dkts. 6169, 6252;
- Organizing and leading the objectors’ efforts at the fairness hearing, *see* Dkt. 7070-1 at 14-15;
- Presenting fully developed legal argument that drew on the evidentiary record the Faneca Objectors had compiled, *see* Dkts. 6082, 6201, 6455;
- Seeking additional improvements through direct – and independent – negotiations with the NFL, *see* Dkt. 7070-1 at 18-19; and
- Organizing and leading the objectors’ efforts on appeal before the Third Circuit, *see* Dkt. 7070-1 at 19-20.<sup>7</sup>

For example, where the Faneca Objectors submitted dozens of pages of argument on CTE rooted in extensive scientific evidence, *see* Dkt. 7070-1 at 8-17; *see also* Dkt. 6019-1 at 9-10, 14-18; Dkt. 6082 at 19-26; Dkt. 6201 at 21-33 & App’x B; Dkt. 6455 at 2-20, the Armstrong Objectors

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physician under the Final Settlement. *Id.* Whether that truly is a benefit is highly questionable. Regardless, the delay stalled the distribution of relief to the class.

<sup>7</sup> The Armstrong Objectors say that they led the appellate proceedings in the Third Circuit. *See* Dkt. 7232 at 8-9. Not so. It was the Faneca Objectors who undertook the labor-intensive process of compiling, preparing, and filing the sixteen-volume, 5,767-page joint appendix in the consolidated appeals. *See* Joint Appendix, No. 15-2304 (3d Cir. filed Aug. 18, 2015). And counsel for the Faneca Objectors was first and last to address the Third Circuit during oral argument, discussing the substantive unfairness of the settlement’s treatment of CTE and the other issues raised in the Faneca Objectors’ briefing. *See* Revised Joint Proposal on Division of Argument Time, No. 15-2304 (3d Cir. filed Nov. 13, 2015); CA3 Oral Arg. Tr. 128:1-130:13.

addressed CTE in three pages without citing any new scientific authority. *See* Dkt. 6353 at 7-9.<sup>8</sup> The Faneca Objectors' discussion of the cap on the BAP Fund as well as the \$1,000 appeal fee was also extensive, citing relevant statistical evidence to support their arguments. *See* Dkt. 6082 at 13, 15, 33 & n.43; Dkt. 6201 at 73-74, 76 & n.89; Dkt. 6455 at 22-23. The Armstrong Objectors, by contrast, discussed each issue in a cursory manner without evidentiary support. Dkt. 6353 at 9-12.<sup>9</sup> While the Faneca Objectors organized and led the argument at the fairness hearing, the Armstrong objectors did not even appear to argue. *Compare* Dkt. 6344 (appointing Faneca Objectors' counsel to "coordinate the arguments of the objectors" at the fairness hearing), *with* Dkt. 6428 (schedule of speakers at fairness hearing).

In the Third Circuit, the Armstrong Objectors completely piggy-backed on the Faneca Objectors' work, citing evidence submitted by the Faneca Objectors no fewer than **71 times**. Armstrong CA3 Br. at 6-14, 18-19, 32, 34-36, No. 15-2272 (3d Cir. filed Sept. 14, 2015). They insist that the "justices" of the Third Circuit were "most interested" in their arguments, Dkt. 7232 at 9, but their arguments were retreads of the Faneca Objectors' arguments. Moreover, the Armstrong Objectors' efforts at meddling in the presentation of arguments to the Third Circuit were soundly rejected by that Court.<sup>10</sup>

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<sup>8</sup> Although the Armstrong Objectors referenced unspecified studies from 2010 and 2013, those studies appear to be evidence that the Faneca Objectors had already cited in their earlier filings. *Compare* Dkt. 6353 at 8, *with* Dkt. 6082 at 9-11, 22 (citing Ann McKee *et al.*, *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 *Brain: A Journal of Neurology* 43 (2012), and National Institute for Occupational Safety and Health, *Brain and Nervous System Disorders Among NFL Players* (Jan. 2013)).

<sup>9</sup> Indeed, while the Armstrong Objectors sought to extend the term of the BAP, they never requested removal of the cap. *Compare* Dkt. 6353 at 9-10, *with* Dkt. 6463 at 108:19-23.

<sup>10</sup> The Armstrong Objectors filed a proposal regarding argument that the Faneca Objectors had warned would be unacceptable to the Court and, indeed, was summarily rejected. *See* Order, *In re Nat'l Football League Players Concussion Injury Litig.*, No. 15-2304 (3d Cir. Oct. 30, 2015).

The claim by the attorneys representing the Armstrong Objectors – who simply filed under-developed versions of the issues that the Faneca Objectors had already identified, who submitted no evidence or expert testimony, who did not present argument at the fairness hearing, and who did not submit post-hearing supplemental briefs – that they were the “driving force behind improvements to the Revised Settlement” is absurd. Dkt. 7232 at 23. It was the work of the Faneca Objectors that turned the fairness hearing into a “truly adversarial” proceeding. *Dewey*, 909 F. Supp. 2d at 395. And it was the work of the Faneca Objectors that secured over \$100 million in additional benefit for the class.

### **III. This Court Can Make a “Reasonable Assessment” of the Settlement’s Value and Award Fees Now**

Objector Cleo Miller, represented by attorney John Pentz, argues that the value of the Final Settlement is “speculative” and urges the Court to defer consideration of objectors’ fees until actual payments are drawn from the settlement fund. Dkt. 7161 at 7-9.<sup>11</sup> That is wrong on both the law and the facts. Attorneys’ fees are paid on the value of the benefit *available* for the class to claim, not on the value of benefit *actually* claimed. *See, e.g., Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 F. App’x 880 (3d Cir. 2016). The value of the Settlement has been the subject of rigorous statistical analysis. It was negotiated on the basis of “actuarial data and analyses performed by . . . economic experts” – separate actuarial teams retained by Class Counsel and the NFL – under the supervision of Special Master Perry Golkin. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 364 (E.D. Pa. 2015). The Faneca Objectors have submitted additional evidence specifically addressing the value of the improvements that resulted from their efforts. *See* Floyd Decl. 3-12. There is nothing

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<sup>11</sup> Objector Curtis Anderson, represented by attorney George Cochran, has expressly adopted Objector Miller’s argument on this point. *See* Dkt. 7237 at 3-4.

“speculative” about the Final Settlement’s value, and it is clear that the benefits – including those resulting from the efforts of the Faneca Objectors – are available for the class to claim. Nothing precludes the Court from awarding fees to Class Counsel or Objectors’ Counsel at this juncture.

In awarding attorneys’ fees under a common fund theory, the Court is not required to determine the value of the fund with absolute specificity. Rather, it is enough to make only a “**reasonable**” assessment” of the fund’s value. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) (emphasis added); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 334 (3d Cir. 1998). In making that reasonable assessment, the Court must look to the value of the entitlement created by the efforts of the Faneca Objectors, not merely the amount of claims that are actually paid: Class members’ “right to share the harvest of the lawsuit . . . , **whether or not they exercise it**, is a benefit in the fund created by the efforts of the class representatives and their counsel.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) (emphasis added); *see also Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 282-83 (6th Cir. 2016). Courts thus determine attorneys’ fees based on the entire value that class members are entitled to claim, rather than the value of what they actually claim. There are “a variety of reasons that settlement funds may remain even after an exhaustive claims process.” *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013). “Class counsel” – or objectors’ counsel – “should not be penalized [in their attorneys’ fees] for these and other legitimate reasons unrelated to the quality of representation they provided.” *Id.*<sup>12</sup>

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<sup>12</sup> By contrast, when courts have based attorneys’ fees on the value of the benefit actually paid to the class, they have done so out of concern that class counsel may have – in an effort to secure a large attorneys’ fee – consented to a settlement that appears generous on its face but is stingy in practice, either because the recovery for individual class members is too small to incentivize the filing of claims or because unnecessary procedural hurdles block meritorious claims. *See*



Courts thus routinely award attorneys' fees in class litigation based upon the value of the benefit made available to the class through the efforts of counsel. In *Boeing*, the Supreme Court found no abuse of discretion in the district court's award of fees based on the size of the entire fund rather than that portion paid on approved claims. 444 U.S. at 477-78. The Third Circuit and other courts have followed *Boeing*'s lead, calculating awards of attorneys' fees based on the entire value of the settlement to which class members are *entitled*, even if some portion of the fund goes unclaimed. The settlement in *Landsman & Funk*, for example, required unclaimed settlement funds to be returned to the defendant. 639 F. App'x at 884. The Third Circuit concluded that the district court, in awarding attorneys' fees, "properly relied on the entire fund" – rather than just that portion of the fund paid out to class members – "as the appropriate benchmark for assessing the size of the fund created and conducting a lodestar check." *Id.*<sup>13</sup>

More recently, in *Gascho*, the Sixth Circuit explicitly rejected the argument that the "benefit [to the class] may be only the actual payments to class members." 822 F.3d at 282. Instead, *Gascho* concluded that "there is value in providing a class member the ability to make a claim, whether she takes advantage of it or not." *Id.* at 288; *see also id.* ("[H]aving the ability to make a claim has value."). It thus affirmed the district court's calculation of attorneys' fees based on a settlement valuation that exceeded the amounts actually paid to class members. *Id.* at

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*Gascho*, 822 F.3d at 287-88; *Baby Prods.*, 708 F.3d at 178. Those concerns are not present here. To the contrary, potential awards for individual class members are large. And there was no unholy bargain between the Faneca Objectors and the NFL. Rather, the Faneca Objectors fought hard to *eliminate* procedural hurdles that might preclude class members from recovering. *See, e.g.*, Dkt. 6082 at 32-35; Dkt. 6201 at 74-79. And they were successful in that effort. *See* Dkt. 7070-1 at 27-28, 38-39.

<sup>13</sup> It is true that *Landsman & Funk* involved a fixed settlement fund, while the MAF in this Settlement makes payments on a "claims-made" basis. That difference, however, is irrelevant. "There is no meaningful distinction between a fund with a reversion provision and a defendant-paid-claims process." *Gascho*, 822 F.3d at 286. "In both cases, unclaimed funds wind up with the defendant." *Id.*; *see also Zink v. First Niagara Bank, N.A.*, No. 13-cv-01076, 2016 WL 7473278, at \*7-8 (W.D.N.Y. Dec. 29, 2016).



282-88. Likewise, the Second Circuit has also held that “[a]n allocation of fees by percentage should therefore be awarded on the basis of the **total funds made available**, whether claimed or not.” *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (emphasis added); *see also Waters v. Int’l Precious Metals Corp.*, 190 F.3d 1291, 1295, 1297-98 (11th Cir. 1999) (“[N]o case has held that a district court must consider only the actual payout in determining attorneys’ fees.”); *Williams v. MGM-Pathe Commc’ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (per curiam) (holding that “district court abused its discretion by basing the fee on the class members’ claims against the fund rather than on a percentage of the entire fund” (footnote omitted)); *Newberg on Class Actions* § 15:70 (5th ed.) (noting “many circuits have approved” awarding attorneys’ fees as a “percentage of the **available** funds” and finding that approach “more defensible”).<sup>14</sup>

Thus, in determining whether the Faneca Objectors’ attorneys’ fees request is reasonable, the Court is not required to “await the actual filing, evaluation and payment of claims,” as Objector Miller argues. Dkt. 7161 at 7. Miller attacks the assumption that all class members

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<sup>14</sup> *See also Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009) (rejecting argument that attorneys’ fee was unreasonable because objectors to fee award improperly “focus[ed] on the amount **claimed** rather than the amount **allocated**”); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (“The district court did not abuse its discretion by calculating attorneys’ fees as a percentage of the total fund.”); *Zink*, 2016 WL 7473278, at \*6-8 (awarding fees on basis of defendant’s agreement to pay claims up to an aggregate of \$2.2 million, regardless of how much the defendant actually pays); *In re Regions Morgan Keegan Sec.*, No. 2:07-cv-2830, 2013 WL 12110279, at \*8 (W.D. Tenn. Aug. 6, 2013) (approving attorneys’ fees of 30% of total fund); *Alleyne v. Time Moving & Storage Inc.*, 264 F.R.D. 41, 59 (E.D.N.Y. 2010) (noting “the value of legal service rendered in the creation of a settlement fund [is not] diminished by the failure of beneficiaries to cash in, regardless of what happens to the surplus”); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 815 (E.D. Wis. 2009) (“The court finds that an award of attorneys’ fees is appropriately based upon the total common fund and not on the amount claimed against it. The \$2.1 million settlement amount was available to the entire class, regardless of the fact that a small number of class members actually filed claims.”); *Wright v. Linkus Enters., Inc.*, 259 F.R.D. 468, 476 (E.D. Cal. 2009) (finding reasonable attorneys’ fee award based on “the proposed total settlement amount”).

eligible for the expanded Death with CTE award “will file a claim.” *Id.* He also questions whether all eligible class members will register for the BAP, and raises similar arguments regarding NFL Europe and the financial hardship waiver. *Id.* at 8. Those concerns are misplaced. No matter how many class members ultimately take advantage of these benefits, their entitlement to do so “is a benefit in the fund created by the efforts of the [Faneca Objectors] and their counsel.” *Boeing*, 444 U.S. at 480; *see also Gascho*, 822 F.3d at 282-88.<sup>15</sup>

Objector Miller identifies no authority to the contrary. He invokes *In re Prudential Insurance Co. of America Sales Practice Litigation*, 962 F. Supp. 572 (D.N.J. 1997), but that case was simply a straightforward application of the requirement that the court “reasonabl[y] assess[ ]” the value of the fund. The court in *Prudential* was unable to make that reasonable assessment because the “value of the proposed settlement [wa]s within a range of \$1.2-\$2.0 billion” – a variance of \$800 million. *Id.* at 582. Given the breadth of that range, the court concluded that the “Settlement Agreement simply does not lend itself to a reasonable valuation at this time.” *Id.* at 583. By contrast, the value of the Settlement here has been estimated with consistency and precision. Actuaries retained by Class Counsel determined that the Settlement – without the Faneca Objectors’ improvements – could be funded by the \$760 million that the NFL initially agreed to pay. Dkt. 6167 at 4. The NFL’s actuaries reached the same conclusion. Dkt.

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<sup>15</sup> Regardless, the Faneca Objectors have good reason to believe participation in the Final Settlement will be high. Where “class members are being offered substantial awards, . . . there is, in the main, a strong incentive for class members to fill out and submit claim forms.” *Alexander v. Fedex Ground Package Sys., Inc.*, No. 05-cv-00038, 2016 WL 1427358, at \*5 (N.D. Cal. Apr. 12, 2016). The potentially large monetary awards under the Settlement – especially for those eligible to receive the Death with CTE benefit, given the 96% prevalence of CTE among retired NFL players – thus create strong incentives for class members to register for the Settlement and to submit claims. As Class Counsel has pointed out, large numbers of class members have requested additional information about the Settlement and a great many have already registered. *See* Dkt. 7151-1 at 7-8, 32 n.24.

6168 at 9-10. Now, a third valuation team has determined that the Settlement is worth \$870.4 million with the Faneca Objectors' improvements. *See* Floyd Decl. 3.<sup>16</sup>

The consistency of those estimates provides ample basis for this Court to reasonably assess the Settlement's value. The valuation of the Final Settlement in this case is thus nothing like the wide-ranging estimate of value at issue in *Prudential*. Indeed, the court in *Prudential* was clear that "it is the *unique circumstances* of *this* settlement that preclude a reasonable valuation." 962 F. Supp. at 583 n.28 (emphasis added). The court expressly disclaimed holding that "a reasonable value would be indeterminable in every 'future fund' case, including any subsequent case which is settled under a structure similar to that existing here." *Id.* In short, it was the inability to reasonably value the settlement at all that drove the court's decision in *Prudential*. Those concerns are not present here. *See* pp. 2-4, *supra*.

Aside from questioning the rate of class members' participation in the Settlement, Objector Miller does not seriously dispute the Faneca Objectors' valuation of the improvements brought about by their efforts.<sup>17</sup> The Faneca Objectors' valuation was rooted in the thorough and comprehensive actuarial reports prepared for both Class Counsel and the NFL, scientific studies and other analysis, Class Counsel's own statements regarding the value of the Settlement, and this Court's findings regarding the value of the Final Settlement in its Order granting final approval. *See* Dkt. 7070-1 at 20-28 & nn.24-39. Were any additional evidence necessary, a

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<sup>16</sup> The valuation in the Floyd Declaration does not include the \$10-million Education Fund.

<sup>17</sup> Objector Miller appears to question whether 96% of the 111 players eligible for the expanded Death with CTE benefit will actually have CTE. Dkt. 7161 at 7. But he completely ignores the most recent publicly available data on CTE, which shows that 96% of former NFL football players tested for CTE by post-mortem autopsy were found to have the condition. *See* Dkt. 7070-1 at 26 & n.34. He does not explain why that study is flawed or inaccurate, and he offers no evidence of his own.

third valuation expert has now validated the Faneca Objectors' estimate of the value they added to the Settlement. *See* Floyd Decl. 5-12.

Ultimately, this Court need only make a reasonable assessment of the value that the Faneca Objectors' efforts added to the settlement. It can do that here. The settling parties' own estimates of the settlement's value combined with the analysis in the Floyd Declaration amply support a valuation in the range of \$102.5 million to \$120.4 million for the benefit the Faneca Objectors brought to the class through their advocacy. The Court should grant their request for attorneys' fees based on that amount.<sup>18</sup>

### **CONCLUSION**

For those reasons, the Court should overrule the Miller and Anderson Objections to the Faneca Objectors' Petition for an Award of Attorneys' Fees and Expenses and should grant the Faneca Objectors' requested attorneys' fees and expenses.<sup>19</sup>

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<sup>18</sup> As the Faneca Objectors previously explained, the additional value conferred by their efforts represented a 13.5% increase over the \$760-million valuation of the Revised Settlement. Dkt. 7070-1 at 41. Co-Lead Class Counsel claim a class benefit of over \$1.1 billion. Dkt. 7151-1 at 34. Assuming that valuation is correct, the Faneca Objectors' improvements still increased the value of the settlement by between 9.3% and 10.9%. Co-Lead Class Counsel's \$950-million MAF valuation, however, includes investment earnings and inflationary adjustments that accrue over the lifetime of the settlement. Dkt. 6167 at 6, 28-29, 35-36 & tbls. 2-2, 6-4. The Faneca Objectors' valuation does not, because attorneys' fees are paid now, not over the term of the settlement. Co-Lead Class Counsel's valuation also includes \$12 million in administration costs that appear to be already included in the MAF valuation. *See, e.g.*, Dkt. 6167 at 37 ("administration costs" were "included in the cash flow modeling"). If those amounts (along with attorneys' fees, which would be shared between Co-Lead Class Counsel and the Faneca Objectors) are excluded from Co-Lead Class Counsel's valuation, then the Faneca Objectors' contributions increased the value of the settlement by between 13.5% and 15.8%.

<sup>19</sup> With this filing, the Faneca Objectors also submit a Revised Summary of Expenses table. The Summary of Expenses filed with their fee petition contained inadvertent errors that resulted in an incorrect accounting of expenses. *See* Dkt. 7070-2 Ex. 7. Attached as Exhibit C is a Revised Summary of Expenses table that accurately reports the expenses for which reimbursement is sought.

Dated: March 27, 2017

Respectfully Submitted,

/s/ Steven F. Molo

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*Counsel for the Faneca Objectors*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 27, 2017, I caused the foregoing Faneca Objectors' Preliminary Response in Support of Their Petition for an Award of Attorneys' Fees and Expenses to be filed with the United States District Court for the Eastern District of Pennsylvania via the Court's CM/ECF system, which will provide electronic notice to all counsel and parties.

/s/ Steven F. Molo

# Exhibit A

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB  
MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Civil Action No. 2:14-cv-00029-AB

Plaintiffs,

v.

National Football League and  
NFL Properties, LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**EXPERT DECLARATION OF**

**Joseph J. Floyd**

**March 27, 2017**

FLOYD ADVISORY LLC  
155 FEDERAL ST, 14<sup>TH</sup> FLOOR  
BOSTON, MA 02110



## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION AND SUMMARY OF OPINION .....</b>	<b>1</b>
<b>A.</b>	<b>Introduction .....</b>	<b>1</b>
<b>B.</b>	<b>Expert Qualifications .....</b>	<b>1</b>
<b>C.</b>	<b>Basis for Opinions and Information Considered.....</b>	<b>2</b>
<b>D.</b>	<b>Summary of Opinion.....</b>	<b>3</b>
<b>II.</b>	<b>BACKGROUND .....</b>	<b>4</b>
<b>A.</b>	<b>Key Events.....</b>	<b>4</b>
<b>III.</b>	<b>ANALYSIS .....</b>	<b>4</b>
<b>A.</b>	<b>June 2014 Settlement Terms and Added Value of Improvements.....</b>	<b>4</b>
<b>B.</b>	<b>Valuation Analysis.....</b>	<b>5</b>

## **LIST OF ATTACHMENTS AND EXHIBITS**

Attachment A	Professional Biography of Joseph J. Floyd
Attachment B	Documents and Information Considered
Exhibit A	June 2014 Settlement Terms and Added Value of Improvements
Exhibit B	Baseline Assessment Program Fund Calculation
Exhibit C	Monetary Award Fund Calculation
Exhibit D	Profile of Former NFL Players by Age
Exhibit E	Eligible Seasons per Player Analysis
Exhibit F	NFL Europe Eligible Seasons included in the June 2014 Settlement Terms Analysis

I, Joseph J. Floyd, declare as follows pursuant to 28 U.S.C. § 1746:

## **I. INTRODUCTION AND SUMMARY OF OPINION**

### **A. Introduction**

I have been engaged by MoloLamken LLP (“Objectors’ Counsel”) as an accounting and finance expert. In that capacity, I have assessed the reasonableness of MoloLamken LLP’s estimated value of the improvements to the June 25, 2014 Settlement Terms (“Added Value of Improvements”). I have also conducted independent valuation analyses to test the assumptions and judgments made by MoloLamken LLP.

To perform my analyses, I reviewed the June 2014 Settlement Terms as of June 25, 2014<sup>1</sup> (“June 2014 Settlement Terms”) and the Final Settlement Terms as of February 13, 2015<sup>2</sup> (“Final Settlement Terms”) agreed to by both parties and the Court in the National Football League Players’ Concussion Injury Litigation (“Litigation”); defined added value consistent with the “before and after” accepted valuation and finance calculation approach; prepared a summary of the June 2014 Settlement Terms and the Added Value of Improvements to the Final Settlement Terms; reviewed the Vasquez Declaration Analysis Research Planning Document<sup>3</sup> (“Analysis Document”); and restated the June 2014 Settlement Terms’ value, explained in the Analysis Document, to calculate an Independent Added Value of Improvements (“Independent Valuation Assessment”).

### **B. Expert Qualifications**

I am the founder and President of Floyd Advisory LLC, a consulting firm with offices in Boston and New York City. Before founding Floyd Advisory LLC, I was one of the founders and a Managing Director of Huron Consulting Group. Prior to Huron Consulting Group, I served as the partner in charge of Arthur Andersen’s Financial Consulting practice in New England.

I earned a Bachelor of Business Administration degree from the University of Massachusetts at Amherst, where I majored in accounting. I also hold a Juris Doctor degree from Suffolk University Law School. I am a licensed Certified Public Accountant in New York and have earned the American Institute of Certified Public Accountants’ (“AICPA”) Accreditation in Business Valuation (“ABV”) and Certification in Financial Forensics (“CFF”). I am a Certified Fraud Examiner (“CFE”).

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<sup>1</sup> Document 6087, Class Action Settlement Agreement as of June 25, 2014.

<sup>2</sup> Document 6481-1, Exhibit A.

<sup>3</sup> Document 6423-21, Declaration of Thomas Vasquez Ph.D.

During my approximately thirty-four-year career in the accounting and consulting profession, I have worked on numerous financial analysis engagements, valuation assignments, financial reporting projects, and other similar assignments, including intellectual property valuations and damages calculations. I have been qualified as an expert and have provided testimony on accounting and financial issues in the United States District Courts in Connecticut, Massachusetts, and Virginia, in the United States Bankruptcy Courts in New York and Massachusetts, and in the trial courts of various states. I have also appeared before the U.S. Securities and Exchange Commission (“SEC”) to discuss and explain the underlying facts, accounting treatment, and reasons for restatement of public registrants’ previously filed financial statements.

Attachment A to this declaration includes a copy of my professional biography and a list of my recent expert testimony. My hourly rate for this engagement is \$700. My compensation is not contingent on any action or event resulting from the analyses, opinions, or conclusions in, or the use of, this declaration.

### **C. Basis for Opinions and Information Considered**

My analyses, opinions, and conclusions are based on the work performed by me and those under my supervision through the date of this declaration. In order to develop my opinions in this matter, various procedures were performed, including the review of aforementioned documents, as well as independent research described herein. A complete list of information considered in forming my opinion is included in Attachment B to this declaration.

I have not been asked to express any opinions related to the June 2014 Settlement Terms’ value in this matter. For purposes of forming my opinion, I have relied upon the opinions in the Analysis Document regarding the value of the June 2014 Settlement Terms. All of my opinions are expressed to a reasonable degree of certainty in my field.

Should further documentation be produced after the date of this declaration and/or should I be asked or permitted to respond to any expert opinions that may be submitted in this Litigation, I reserve the right to supplement my opinion, and therefore, this declaration is subject to change or modification should additional relevant information become available which bears on the analyses, opinions, or conclusions contained herein.

As a CPA, my services are subject to the AICPA Code of Professional Conduct and the AICPA’s Statements on Standards for Consulting Services.

#### D. Summary of Opinion

Based on the procedures and analyses described herein, the amounts represented by Objectors' Counsel as the Added Value of Improvements to the June 2014 Settlement Terms are fairly stated and reasonably reflect the added value arising out of the Final Settlement Terms.

In preparing their calculations, Objectors' Counsel applied the generally accepted valuation and finance methodology commonly referred to as "before and after" when estimating the Added Value of Improvements. In my opinion, the "before and after" methodology is the appropriate approach to apply to estimate the Added Value of Improvements.

In the Valuation Analysis section of my declaration, I describe each component of the Added Value of Improvements including: 1) Uncapping the BAP Fund to Guarantee a Baseline Assessment for Every Eligible Class Member, 2) Eligible-Season Credit for Seasons Played in NFL Europe, 3) the Expanded Scope of the Death with CTE Qualifying Diagnosis, and 4) Elimination of the \$1,000 Appeal Fee in Cases of Financial Hardship. Importantly, for each, I summarize the June 2014 Settlement Terms' valuation methodology, the Added Value of Improvements' valuation methodology and estimates, and present my Independent Valuation Assessment. I have recalculated the amounts presented by Objectors' Counsel, analyzed the estimates assumed by Objectors' Counsel, and evaluated the reasonableness of all assumptions used by Objectors' Counsel. As described in my declaration, I did identify certain adjustments to Objectors' Counsel's calculations; some lower the result and others increase the result, with the net adjustment being an increase in the Added Value of Improvements created by the Final Settlement Terms.

The following table summarizes the Independent Valuation Assessment amounts from my declaration, including my adjustments made to Objectors' Counsel's calculations.

*\$ (in millions)*

<i>Fund</i>	<i>Original Value</i>	<b>Independent Valuation Assessment</b>				<i>Total Added Value</i>	<i>Total Adjusted Value</i>
		<i>Uncapping the BAP Fund</i>	<i>NFL Europe Eligible-Season Credit</i>	<i>Expanded Qualifying Diagnosis for Death with CTE</i>	<i>Elimination of Appeal Fee</i>		
<b>Baseline Assessment Program</b>	<b>\$75.0</b>	<b>\$29.6</b>	<b>\$13.2</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$42.8</b>	<b>\$117.8</b>
Administrative Costs	7.5	-	-	-	-	-	7.5
Baseline Examinations	41.3	18.1 *	8.1	-	-	26.2	67.5
Supplemental Benefits	26.2	11.5 *	5.1 *	-	-	16.6	42.8
<b>Monetary Award</b>	<b>675.0</b>	<b>-</b>	<b>22.1 *</b>	<b>44.6</b>	<b>10.9</b>	<b>77.6</b>	<b>752.6</b>
<b>Total Value</b>	<b>\$750.0</b>	<b>\$29.6</b>	<b>\$35.3</b>	<b>\$44.6</b>	<b>\$10.9</b>	<b>\$120.4</b>	<b>\$870.4</b>

\*Amounts are different than the Objectors' Counsel's Added Value of Improvements as they include items I identified that Objectors' Counsel did not consider. In the Valuation Analysis section of my declaration I have provided detailed explanations of the differences.

## **II. BACKGROUND**

### **A. Key Events**

A review of the key events in the Litigation that are material to my analysis are as follows:

- In August 2013, the parties in this case announced that they signed a term sheet for a global settlement of the concussion claims against the NFL.<sup>4</sup>
- On January 6, 2014, Class Counsel and the NFL filed the Initial Settlement and a class action personal-injury complaint, along with a motion for preliminary approval of the settlement.<sup>5</sup>
- The NFL and Class Counsel announced a Revised Settlement on June 25, 2014.<sup>6</sup>
- On February 2, 2015, the Court issued an Order identifying changes that the Court believed would enhance the fairness of the Revised Settlement. The settling parties adopted all of the Court's recommendations, resulting in the Final Settlement.<sup>7</sup>
- On April 22, 2015, the Court issued its order certifying the class for settlement purposes and giving final approval to the Final Settlement.<sup>8</sup>

## **III. ANALYSIS**

### **A. June 2014 Settlement Terms and Added Value of Improvements**

The June 2014 Settlement Terms' value includes two major categories, the Baseline Assessment Program ("BAP") Fund, and the Monetary Award Fund ("MAF"). Each category uses assumptions to analyze the number of NFL players eligible to receive a benefit and the associated payment ("Eligible Class Members").

Attached as Exhibit A is a summary of the June 2014 Settlement Terms and Added Value of Improvements, which include:

1. Uncapping the BAP Fund to Guarantee a Baseline Assessment for Every Eligible Class Member
2. Eligible-Season Credit for Seasons Played in NFL Europe
3. The Expanded Scope of the Death with CTE Qualifying Diagnosis
4. Elimination of the \$1,000 Appeal Fee in Cases of Financial Hardship

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<sup>4</sup> Document 7070-2, Declaration of Steven F. Molo in Support of Petition for an Award of Attorneys' Fees and Expenses, pg. 3.

<sup>5</sup> *Ibid.*, pg. 4.

<sup>6</sup> *Ibid.*, pg. 6.

<sup>7</sup> *Ibid.*, pg. 14-15.

<sup>8</sup> *Ibid.*, pg. 16.

In the Valuation Analysis section of my declaration I will:

- Summarize the June 2014 Settlement Terms’ valuation methodology
- Summarize the Added Value of Improvements’ valuation methodology and estimates
- Create an Independent Valuation Assessment

## **B. Valuation Analysis**

Objectors’ Counsel applied the generally accepted valuation and finance methodology commonly referred to as “before and after” when estimating the components of the Added Value of Improvements. This methodology is applied in situations when a base amount or calculation exists, and an increment is to be deducted or added to determine an adjusted financial result. Important to a proper “before and after” calculation is a thorough assessment of the assumptions and information in the base amount or calculation, and consideration of how new information or assumptions may impact or alter these assumptions.

The “before and after” methodology is often used in performing business damage calculations such as when a breach of contract occurs or a business experiences an interruption to expected results. The methodology is also often used to make business decisions such as assessing the profitability of a new product line expansion or other business organizational changes. When preparing a financial estimation model, the methodology may determine the value of any “what if” scenario that a financial analyst is asked to perform.<sup>9</sup> In my opinion, the “before and after” methodology is the appropriate approach to apply to estimate the components of the Added Value of Improvements.

### **1. Uncapping the BAP Fund to Guarantee a Baseline Assessment for Every Eligible Class Member<sup>10</sup>**

It is my understanding that the Court will seek to evaluate the total financial impact of the Added Value of Improvements in establishing an award for attorney’s fees. This is a critical fact when assessing the valuation impact of the Added Value of Improvements for uncapping the original BAP Fund amount of \$75 million for baseline examinations. Importantly, uncapping the BAP Fund amount guarantees that a baseline assessment exam will be available for every Eligible Class Member.<sup>11</sup>

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<sup>9</sup> Shannon P. Pratt and Alina V. Niculita, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies*, 5th Ed.

<sup>10</sup> The administrative costs are valued at \$7.5 million. There is no added value to this section; thus, I did not include an assessment of this section in my declaration.

<sup>11</sup> In this section, as described above, I have calculated the maximum possible estimated pay out of Supplemental Benefits. I have not considered the \$75 million cap, which depending on the Court’s actions may still be applicable to the Supplemental Benefits. Further, a major variable in assessing the Value Added of Improvements if a cap on Supplemental Benefits remains will be the timing of when exam costs are used as they may absorb a large percentage of the cap.

*June 2014 Settlement Terms' valuation methodology*

To value the June 2014 Settlement Terms, the Analysis Document calculated the Eligible Class Members able to receive an exam, assumed that approximately 70% would actually seek an exam, and applied an estimated cost per exam of \$3,500. The calculation resulted in a value for the exam portion of the BAP Fund of \$41.3 million.<sup>12</sup>

In addition, to value the Supplemental Benefits portion of the BAP Fund, the Analysis Document estimated the number of Eligible Class Members who will require medical treatment for Level 1 Neurocognitive Impairment, also assuming an approximately 70% participation rate, and then applied an estimated cost per member for the medical treatment. The calculation resulted in a value for the Supplemental Benefit portion of the BAP Fund of approximately \$26.2 million.<sup>13</sup>

*Added Value of Improvements' valuation methodology and estimates*

Uncapping the BAP Fund to guarantee an exam for every Eligible Class Member creates an unimpeded opportunity and therefore value for every Eligible Class Member to secure an exam without any restrictions or limitations. To calculate the Added Value of Improvements, Objectors' Counsel assumed a 100% participation rate instead of the approximate 70% participation rate, which is included in the June 2014 Settlement Terms' calculation. The adjusted calculation result is approximately \$59.4 million,<sup>14</sup> for an added value of \$18.1 million. Of significance, the approximate 70% participation was set with the cap on the exam cost, so presenting the Added Value of Improvements when removing the cap logically should be assessed with the total value now available to the entire Eligible Class Member population.

Objectors' Counsel's calculation underestimated the added value and calculated \$11.4 million in this section.<sup>15</sup> The understatement is due to the absence of considering the administrative costs for the BAP Fund when calculating the effect of this update.

*Independent Valuation Assessment*

Based on my understanding that the Court will seek to evaluate the total financial impact of the Added Value of Improvements in establishing an award for attorney's fees, a calculation that measures the aggregate value created by the removal of the cap is appropriate. A player's choice to participate, would not change the value available to them in receiving the \$3,500 exam. As such, the added value of removing the BAP Fund cap, is reasonably stated as approximately \$18.1 million (refer to Exhibit B).

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<sup>12</sup> Document 6423-21, Declaration of Thomas Vasquez Ph.D., pg. 9.

<sup>13</sup> *Ibid.*, pg. 9.

<sup>14</sup> Document 7070-1, Faneca Objectors' Memorandum of Law in Support of Petition for an Award of Attorneys' Fees and Expenses, pg. 21.

<sup>15</sup> *Ibid.*, pg. 22. \$11.4 million = \$59.4 million (Baseline Examination) + \$27 million (Supplement Benefits) - \$75 million cap. Refer to Footnote 14 for an explanation of this calculation.



Consistent with measuring the total financial impact of the Added Value of Improvements, and a matter not presented by Objectors' Counsel, the value of the Supplemental Benefits available to Eligible Class Members will also increase as a result of removing the cap on the BAP Fund. The number of Eligible Class Members receiving Supplemental Benefits relies on the NFL's calculation of participants when establishing the cap. Thus, measuring the total financial impact of removing the cap requires a similar increase, recognizing value for those members eligible for the benefit without any limitation on the funding. I estimated this added value for removing the cap on the BAP Fund as approximately \$11.5 million (refer to Exhibit B).

## 2. Eligible-Season Credit for Seasons Played in NFL Europe

The original calculation of Eligible Seasons in the Analysis Document described populations of former players from the NFL League, AFL League, NFL Europe League, NFL Europa League, and World League of American Football. However, the calculation for the June 2014 Settlement Terms reflected a zero credit, or no recognition at all in the calculation for NFL Europe League, NFL Europa League, and World League of American Football (collectively "NFL Europe") seasons. Among the Added Value of Improvements, the Final Settlement Terms now include half an Eligible Season for NFL Europe seasons. This change affects the class members in two ways, related to the BAP Fund<sup>16</sup> and the MAF. First, players with only NFL Europe seasons that previously were not able to participate in the BAP, are now included in that population. Second, former NFL Europe players, including those already in the MAF calculations who also played in the NFL, and those who played only in NFL Europe, will be eligible for additional Eligible Seasons in the MAF calculation.

### *June 2014 Settlement Terms' valuation methodology*

To value the June 2014 Settlement Terms, the Analysis Document calculated the seasons played in NFL Europe as zero Eligible Seasons. This affects both the BAP Fund and MAF calculations.

Under the June 2014 Settlement Terms, participation in the BAP Fund required at least half an Eligible Season. As the June 2014 Settlement Terms included NFL Europe at zero Eligible Seasons, the BAP Fund does not include the NFL-Europe-only players within the population of Eligible Class Members who qualify for an exam. As such, exam and supplemental benefits were not available to these players and the value of any benefit was therefore zero.

In contrast, the MAF calculation includes NFL-Europe-only players but at zero Eligible Seasons. However, these players did receive some benefit recognition in the original calculation, as zero Eligible Seasons

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<sup>16</sup> In this section, as described above, I have calculated the maximum possible estimated pay out of Supplemental Benefits. I have not considered the \$75 million cap, which depending on the Court's actions may still be applicable to the Supplemental Benefits. Further, a major variable in assessing the Value Added of Improvements if a cap on Supplemental Benefits remains will be the timing of when exam costs are used as they may absorb a large percentage of the cap.

resulted in receiving 2.5% of the payment. As described in the Analysis Document, the calculation considers 2.5% of the Eligible Class Members payment for NFL-Europe-only players. Unfortunately, the value attributable to the NFL Europe players based on this calculation is not readily available in the Analysis Document.

*Added Value of Improvements' valuation methodology and estimates*

To calculate the added value of making NFL-Europe-only players eligible for exams and supplemental benefits under the BAP Fund, Objectors' Counsel identified the approximately 2,300 NFL-Europe-only players and multiplied this number by the estimated value for the exam of \$3,500. This results in an added value for the BAP Fund of \$8.1 million.<sup>17</sup> Objectors' Counsel next determined the percentage of the players who qualified for Supplemental Benefits in the Analysis Document. Applying this percentage of 4.4% to the approximately 2,300 players results in approximately 101 players being eligible and receiving Supplemental Benefits. Based on the average value of \$35,000 for the Supplemental Benefits from the Analysis Document, this increase results in added value related to the BAP Fund of \$3.5 million.<sup>18</sup>

The MAF increase is based on the added value of including all of the Eligible Seasons played in NFL Europe as half an Eligible Season. Importantly, the value of the Analysis Document's MAF is based on several major variables including age of the player, playing years or tenure and probability factors for contracting the defined diagnoses. Objectors' Counsel calculated the added value of including the NFL Europe seasons by determining the average Eligible Class Member payment for a season, and multiplying this amount of approximately \$11,185 to the added Eligible Seasons arising from adding the NFL Europe seasons. The calculation results in added value of \$24.0 million for the MAF.<sup>19</sup>

*Independent Valuation Assessment*

First, I will address the added value calculations for the BAP Fund. My analysis of the Added Value of Improvements for the exam portion of the BAP Fund when including the NFL Europe players is the same as the approach described in the Added Value of Improvements' valuation methodology and estimates section above. Based on my review of adding the approximately 2,300 players and the discussion provided earlier in the Added Value of Improvements' valuation methodology and estimates section, the calculation of added value of \$8.1 million for the BAP Fund for the value available to players through receiving the exam appears reasonable (refer to Exhibit B).

The second portion of the BAP Fund is for the Supplemental Benefits. I identified that Objectors' Counsel's calculation underestimated their added value by \$1.6 million in this section. When determining the percentage of the players who qualified for Supplemental Benefits in the Analysis Document, Objectors'

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<sup>17</sup> Document 7070-1, Faneca Objectors' Memorandum of Law in Support of Petition for an Award of Attorneys' Fees and Expenses, pg. 25.

<sup>18</sup> Document 7070-1, Faneca Objectors' Memorandum of Law in Support of Petition for an Award of Attorneys' Fees and Expenses, pg. 26.

<sup>19</sup> *Ibid.*, pg. 23-24.

Counsel should have factored in that the Analysis Document used a different participation rate. Thus, to recalculate the percent of the players who qualified for Supplemental Benefits, the following amounts in the Analysis Document should be used: Total Participating Eligible Class Members, and the Eligible Class Members Estimated to have Level 1 Neurocognitive Impairment. The calculation results in a 6.4% rate (refer to Exhibit B). The increase results in a total added value for the BAP Fund of \$5.1 million for this section (refer to Exhibit B).

For the MAF calculation performed by Objectors' Counsel, I evaluated the inputs and assumptions described above that are used in the Analysis Document calculation to assess the reasonableness of applying an average value from this calculation to the added NFL Europe players and seasons. Of significance, the actual calculation model was not provided nor appears to be able to be easily replicated. Age and Eligible Seasons appear to be the major factors that contribute to determining the probability that an Eligible Class Member will have a Qualifying Diagnosis, and thereby be eligible to receive a payment. I assessed the comparability of each of these factors for the NFL population and the NFL Europe population.

Ages for the populations can be estimated by evaluating the inception dates of the Leagues: the NFL Europe began in 1991,<sup>20</sup> and the NFL began in 1920.<sup>21</sup> Thus, it appears reasonable to assume that if the average NFL player began their career at age 25 in NFL Europe, when it began in 1991, they would be only 49 years old at the time of the Final Settlement Terms, and other players who entered the league thereafter would be younger, causing a lower average. As the average NFL player is 51 years old, it is reasonable to assume NFL Europe players are younger and are more likely to receive a payment for a Qualifying Diagnosis (refer to Exhibit D).

With regard to Eligible Seasons, the NFL population has a higher average, at 3.2 years, than the NFL Europe population, at approximately 2.0 years<sup>22</sup> (refer to Exhibit E). It is my understanding that more Eligible Seasons equates to a higher likelihood the player may receive a Qualifying Diagnosis. The difference approximates to just over one season, and in the absence of the detailed model calculations, does not appear to be so significant to negate the usefulness of using the average.

When considering the age and Eligible Seasons comparisons, which if they have differences, they are offsetting, the use of the value for the NFL average season appears to be a fair estimate for the added value to the MAF for the NFL Europe seasons.

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<sup>20</sup> NFL.com News, "NFL Europa Closes," <http://www.nfl.com/news/story/09000d5d801308ec/article/nfl-europa-closes>.

<sup>21</sup> Encyclopedia Britannica, "National Football League (NFL)," <https://www.britannica.com/topic/National-Football-League>.

<sup>22</sup> The average NFL Europe Eligible Seasons population in this comparison was not counted as half an Eligible Season, per the Final Settlement Terms, but rather as a whole season in order to have direct comparability to the total NFL population in terms of the number of seasons played.

In addition, during my review, I identified that Objectors' Counsel did not consider the 2.5% payment for NFL-Europe-only players included in the June 2014 Settlement Terms when calculating added value for the MAF. To determine a fair measure for this value, I used the average amount funded for each Eligible Class Member and multiplied it by 2.5% to arrive at \$1.9 million (refer to Exhibit F). In the absence of additional information, this amount appears reasonable as the value that should be deducted from Objectors' Counsel's calculation for the added value to the MAF, resulting in a revised amount of \$22.1 million (refer to Exhibit C).

### 3. The Expanded Scope of the Death with CTE Qualifying Diagnosis

The Scope of the Death with CTE Qualifying Diagnosis was extended from July 7, 2014 to April 22, 2015. It is my understanding that the Expanded Scope of the Death with CTE payment will qualify additional Eligible Class Members to receive a payment from the MAF.

#### *June 2014 Settlement Terms' valuation methodology*

The June 2014 Settlement Terms do not have a value for this population as the Revised Settlement Terms do not pay Death with CTE benefits in the extended timeframe population.

#### *Added Value of Improvements' valuation methodology and estimates*

Extending the eligibility for diagnoses of Death with CTE creates value for every player that is in the extended population. To calculate the Added Value of Improvement, each NFL player who has died during the extended timeframe is individually assessed. The potential MAF payment for each player is calculated assuming all players qualified for a Death with CTE payment, and considers all significant factors needed to determine the MAF payment described in the June 2014 Settlement Terms and Added Value of Improvements section. An average is then calculated to determine the average MAF payment for Death with CTE in the extended population. The estimated population of the players who died with CTE is then calculated based on the prevalence of CTE in the NFL population as reported in prior studies. The average MAF payment for Death with CTE in the extended population is applied to the estimated population of the players who died with CTE to determine the added value. The adjusted calculation results in an added value of \$44.6 million.<sup>23</sup>

#### *Independent Valuation Assessment*

Based on my understanding that the eligibility for diagnoses of Death with CTE is extended, a calculation that measures the aggregate value created by the extended eligibility is appropriate. Objectors' Counsel researched and provided the data for the NFL players who have died in the extended timeframe, the MAF payment calculated for each player, and the estimated population of players who died with CTE. I

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<sup>23</sup> Document 7070-1, Faneca Objectors' Memorandum of Law in Support of Petition for an Award of Attorneys' Fees and Expenses, pg. 26-27.

recalculated the amounts and find the estimate reasonable for Objectors' Counsel to use. As such, the added value of the extended eligibility, is reasonably stated as approximately \$44.6 million (refer to Exhibit C).

#### 4. Elimination of the \$1,000 Appeal Fee in Cases of Financial Hardship

It is my understanding that, because the appeal fee is eliminated in cases of financial hardship, the fee will no longer deter certain Eligible Class Members from appealing when their claims are denied during the MAF process.

##### *June 2014 Settlement Terms' valuation methodology*

The June 2014 Settlement Terms do not have a value for this population as it did not consider the appeal fee deterring financially stressed Eligible Class Members from appealing when their claims are denied during the MAF process.

##### *Added Value of Improvements' valuation methodology and estimates*

The elimination of the appeal fee creates value for those Eligible Class Members under financial stress, who are deterred from the appeal process due to the fee, and who would have been successful on appeal. To calculate the Added Value of Improvement, Objectors' Counsel used data from the NFL disability claim process, which is used to estimate how many claims are originally denied, then approved during the appeal process. The percent of the total is used to determine how many of the Eligible Class Members during the appeal process, when their claims are originally denied, would be accepted. An estimate is then made to calculate how much of this population would be under financial stress and deterred from appealing due to the appeal fee. Objectors' Counsel used data as reported in prior studies to form this estimate based on the number of NFL players under financial stress when they retire, and how many file for bankruptcy, to determine a reasonable and conservative estimate. These estimates are applied to the average amount funded per Eligible Class Member to calculate the added value. The adjusted calculation results in an added value of \$10.9 million.<sup>24</sup>

##### *Independent Valuation Assessment*

Based on my understanding of the elimination of the appeal fee, a calculation that measures the aggregate value created by elimination of the appeal fee is appropriate. Objectors' Counsel researched and provided the data for the NFL disability claim, financial stress, and bankruptcy. I recalculated the amounts and find the estimate reasonable for Objectors' Counsel to use. The result is 58 Eligible Class Members who are assumed to be denied, who would not appeal due to the appeal fee, and whose claims would have been accepted on appeal. To test this result, I calculated the size of this population relative to the entire Eligible Class Members with a Qualifying Diagnosis. The 58 Eligible Class Members represent less than one quarter of one percent, a relatively de minimis amount. In assessing the reasonableness of this conclusion, I rely on

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<sup>24</sup> *Ibid.*, pg. 27-28.

accepted behavioral science theories, notably the loss aversion (prospect theory) and rational choice.<sup>25</sup> Importantly, loss aversion means that people make decisions that value losses far greater than gains. In this case, losing \$1,000 can be a deterrent for many in the rejected population. In addition rational choice means that with nothing to lose, and knowledge of potential upside, the rejected players would be motivated to appeal due to the waiver of the appeal fee if they are in financial stress. Based on the nominal amount of players estimated in the additional population, and these behavioral science theories, the amount calculated by Objectors' Counsel appears reasonable and conservative as a valuation estimate (refer to Exhibit C).

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<sup>25</sup> Encyclopedia Britannica, "Prospect Theory," <https://www.britannica.com/topic/prospect-theory>.  
Encyclopedia Britannica, "Rational Choice Theory," <https://www.britannica.com/topic/rational-choice-theory>.

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I reserve the right to supplement or amend this declaration as additional relevant information becomes available and to address issues raised by other witnesses.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 27, 2017 in Boston, MA.



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Joseph J. Floyd

## **Attachment A**

### **Professional Biography of Joseph J. Floyd**





## JOSEPH J. FLOYD, CPA, JD, CFE, CGMA, ABV



### Education and Certifications

- Bachelor's degree in Accounting, University of Massachusetts at Amherst
- Juris Doctor, Suffolk University Law School
- Certified Public Accountant, New York
- Certified Fraud Examiner
- Certified in Financial Forensics
- AICPA Certificate in International Financial Reporting Standards
- Chartered Global Management Accountant (CGMA)
- AICPA Accreditation in Business Valuation (ABV)

### Affiliations

- American Institute of Certified Public Accountants
- Association of Certified Fraud Examiners
- Massachusetts Bar, Retirement Status

**Joseph J. Floyd** is the founder and President of Floyd Advisory. Mr. Floyd, for whom the company is named, has worked with a prestigious, varied list of clients including Global 1000 companies, major law offices, private equity firms and others in need of expert advice and solutions for complex financial reporting, accounting and strategic business matters.

Mr. Floyd has served as an expert witness and testified on accounting and financial issues in the United States District Court and the United States Bankruptcy Court in several states and in the trial courts of various states. He has appeared before the Securities and Exchange Commission to outline and analyze facts, practices and principles related to public company financial statement changes.

Prior to forming Floyd Advisory, Mr. Floyd was one of the Founding Managing Directors of Huron Consulting Group. Before his tenure at Huron Consulting Group, he was the Partner in charge of Arthur Andersen's Financial Consulting practice in New England and an active member of the firm's regional leadership group.

Mr. Floyd's professional experience includes a combination of strategy and valuation assignments, projects involving SEC reporting and transaction analyses as well as providing financial expertise. Examples include:

- Advising boards of directors, audit committees and special committees related to the accounting investigation results, complex financial reporting decisions and related matters.
- Providing testimony as an expert on accounting, auditing, and financial reporting standards, business damages, intellectual property matters, and other financial analyses.
- Providing expert advice on business decisions, strategies, accounting policies and practices and financial analyses to entrepreneurs, investors, executives and private equity firms.
- Serving as the accounting arbitrator, consultant and expert in post-acquisition disputes.
- Performing valuation engagements including valuations of closely held corporation interests purchase price allocations and impairment tests.

## Testimony

### *Trial and Deposition Testimony, 2013 to date*

- Acushnet Company v. Beam Inc. f/k/a Fortune Brands, Inc. Superior Court Department, Commonwealth of Massachusetts, Accounting for VAT in a Post Acquisition Dispute (Deposition, January 2015; Testimony, May 2016)
- EJK Realty, et al. v. Alfred Carpionato, et al., American Arbitration Association, Damages Analysis for a Contractual Dispute (Testimony, April 2016)
- Andy H. Sassine v. Fidelity Management & Research Company, Suffolk Superior Court, Commonwealth of Massachusetts, Rebuttal of Damages Analysis (Deposition, February 2016; Testimony, April 2016)
- Matthew J. Szulik, et. al. v. State Street Bank and Trust Company, United States District Court, District of Massachusetts, Analysis of Custodial Transactions and Business Damages (Deposition, March 2015)
- Michele LeComte Chambers, et al. v. Gold Medal Bakery, Inc., Bakery Products Corp., Roland S. LeComte, and Brian R. LeComte, American Arbitration Association Panel, Independent Valuation of a Closely-Held Business (Deposition, March 2014; Testimony, May 2014)
- Justin M. Scott v. Putnam, LLC, PUTNAM, LLC D/B/A Putnam Investments, Putman Investments, Inc., Putnam Investment Management, LLC, Marsh & McLennan Companies, Inc., John Doe Plan Administrators 1-12, Rebuttal of Damages Analysis (Deposition, April 2014)
- Securities and Exchange Commission vs. Larry A. Goldstone, Clarence G. Simmons, III, and Jane E. Starrett, United States District Court for the District of New Mexico, Auditors' Responsibilities Under Generally Accepted Auditing Standards / Financial Statement Restatements (Deposition, March 2014)
- Northeastern University v. Jarg Corporation, American Arbitration Panel, Application of GAAP to a Multiple- Element Litigation Settlement (Testimony, February 2013)
- Origami Partners III L.P. v. Pursuit Capital Partners (Cayman) Ltd., Pursuit Capital Partners Master (Cayman) Ltd., and Pursuit Investment Management LLC, FSD Cause No. 36 of 2011 (PCJ), Grand Court of Cayman Islands Financial Services Division, Accounting for Contingencies (Testimony, January 2013)

## **Attachment B – Documents and Information Considered**

In forming my opinions and observations, I have considered the information and documents referenced in my report and/or listed below:

### **Court Filings**

Document 6073-5, Memorandum of Law In Support of Motion of Proposed Class Counsel for an Order: (1) Granting Preliminary Approval of the Class Action Settlement Agreement; (2) Conditionally Certifying a Settlement Class and Subclasses; (3) Appointing Co-Lead Class Counsel, Class Counsel, and Subclass Counsel; (4) Approving the Dissemination of Class Notice; (5) Scheduling a Fairness Hearing; and (6) Staying Matters as to the Released Parties and Enjoining Proposed Settlement Class Members from Pursuing Related Lawsuits, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, June 25, 2014.

Document 6087, Class Action Settlement Agreement as of June 25, 2014, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, June 25, 2014.

Document 6167, Material Provided by Counsel to the Plaintiffs, Seeger Weiss LLP, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, September 12, 2014.

Document 6168, Material Provided by Counsel to the NFL, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, September 12, 2014.

Document 6423-21, Declaration of Thomas Vasquez Ph.D, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, November 12, 2014.

Document 6479, Order, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, February 2, 2015.

Document 6481, Class Counsel and the NFL Parties' Joint Submission in Response to the February 2, 2015 Order of the Court, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, February 13, 2015.

Document 6481-1, Exhibit A, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, February 13, 2015.

Document 6481-2, Exhibit B, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, February 13, 2015.

Final Approval Order, 307 F.R.D. 351, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, April 22, 2015.

Document 7070-1, Faneca Objectors' Memorandum of Law in Support of Petition for an Award of Attorneys' Fees and Expenses, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, January 11, 2017.

Document 7070-2, Declaration of Steven F. Molo in Support of Petition for an Award of Attorneys' Fees and Expenses, Case 2:12-md-02323-AB, United States District Court for the Eastern District of Pennsylvania, January 11, 2017.

## Attachment B – Documents and Information Considered

### Other

Encyclopedia Britannica, “National Football League (NFL),” <https://www.britannica.com/topic/National-Football-League> (accessed March 22, 2017).

Encyclopedia Britannica, “Prospect Theory,” <https://www.britannica.com/topic/prospect-theory> (accessed March 22, 2017).

Encyclopedia Britannica, “Rational Choice Theory,” <https://www.britannica.com/topic/rational-choice-theory> (accessed March 22, 2017).

NFL.com News, “NFL Europa Closes,” <http://www.nfl.com/news/story/09000d5d801308ec/article/nfl-europa-closes> (accessed March 22, 2017).

Shannon P. Pratt and Alina V. Niculita, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies*, 5th ed. (New York, NY: The McGraw-Hill Companies, Inc.).

**Exhibit A: June 2014 Settlement Terms and Added Value of Improvements**

The information included in the “June 2014 Settlement Terms” column below is cited from Document 6087, Class Action Settlement Agreement as of June 25, 2014.

The information included in the “Added Value of Improvements” column below is cited from Document 6481-1, Exhibit A (Class Action Settlement Agreement as Amended on February 13, 2015).

<b>June 2014 Settlement Terms</b>	<b>Added Value of Improvements</b>
<p><b>Settlement Class</b></p> <p><u>Retired NFL Football Players:</u> Prior to July 7, 2014, all living NFL Football players who (1) have retired, formally or informally, from playing professional football with the NFL or any Member Club, including AFL, World League of American Football, NFL Europe League, and NFL Europa League players, or (2) were formerly on any roster, including preseason, regular season, or postseason, of any such Member Club or league and no longer are under contract to a Member Club and are not seeking active employment as a player with any Member Club, whether signed to a roster or signed to any practice squad, developmental squad, or taxi squad of a Member Club.</p> <p>The Settlement Class does not include: (a) current NFL players, and (b) people who tried out for NFL or AFL Member Clubs, or World League of American Football, NFL Europe League or NFL Europa League teams, but did not make it onto preseason, regular season or postseason rosters, or practice squads, developmental squads or taxi squads.</p>	
<p><b>Baseline Assessment Program (BAP)</b></p> <p>All living retired players who have earned at least one-half of an Eligible Season (see definition below), who do not exclude themselves from the Settlement (see definition below), and who timely register to participate in the Settlement (see definition below) may participate in the Baseline Assessment Program (“BAP”).</p> <p><u>Eligible Season:</u> The Settlement uses the term “Eligible Season” to count the seasons in which a retired player played or practiced in the NFL or AFL. A retired player earns an Eligible Season for:</p> <ul style="list-style-type: none"><li>• Each season where he was on an NFL or AFL Member Club’s “Active List” (see definition below) for either three or more regular season or postseason games, or</li><li>• Where he was on an Active List for one or more regular or postseason games and then spent two regular or postseason games on an injured reserve list or inactive list due to a concussion or head injury.</li></ul>	<p><i>Eligible-Season Credit for Seasons Played in NFL Europe - “Eligible Season” means a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club’s Active List on the date of three (3) or more regular season or postseason games; or (ii) on a</i></p>

**Exhibit A: June 2014 Settlement Terms and Added Value of Improvements**

<b>June 2014 Settlement Terms</b>	<b>Added Value of Improvements</b>
<ul style="list-style-type: none"> <li>• A retired player also earns one-half of an Eligible Season for each season where he was on an NFL or AFL Member Club's practice, developmental, or taxi squad for at least eight games, but did not otherwise earn an Eligible Season.</li> <li>• <i>Time spent playing or practicing in the World League of American Football, NFL Europe League, and NFL Europa League does not count towards an Eligible Season.</i></li> </ul> <p><u>Active List:</u> The "Active List" means the list of all players physically present, eligible and under contract to play for an NFL or AFL Member Club on a particular game day within any applicable roster or squad limits in the applicable NFL or AFL Constitution and Bylaws.</p> <p><u>Exclude themselves from the Settlement:</u> To be excluded from the Settlement, Class Members must mail a letter or other written document to the Claims Administrator.</p> <p><u>Timely register to participate in the Settlement:</u> To get benefits, Class Members will need to register. This is true for all Settlement Class Members, including Representative and Derivative Claimants. Registration for benefits will not begin until after Final Settlement Approval. To receive any Settlement benefits, Class Members must register on or before 180 days from the date that further notice about the registration process and deadlines is posted on <a href="http://www.NFLConcussionSettlement.com">www.NFLConcussionSettlement.com</a>.</p> <p>The BAP will provide baseline neuropsychological and neurological assessment examinations to determine whether retired players are currently suffering from cognitive impairment. Retired players will have from two to ten years, depending on their age as of the date the Settlement is finally approved and any appeals are fully resolved ("Final Settlement Approval"), to have a baseline examination conducted through a nationwide network of qualified and independent medical providers.</p> <ul style="list-style-type: none"> <li>• Retired players 43 or older as of the date the Settlement goes into effect will need to have a baseline examination within two years of the start of the BAP.</li> <li>• Retired players under the age of 43 as of the date the Settlement goes into effect will need to have a baseline examination within 10 years of the start of the BAP, or before they turn 45, whichever comes sooner.</li> </ul> <p>Retired players who are diagnosed with Level 1 Neurocognitive Impairment (i.e., moderate cognitive impairment) are eligible to receive further medical testing and/or treatment (including counseling</p>	<p><i>Member Club's Active List on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on a Member Club's injured reserve list or inactive list due to a concussion or head injury. A "half of an Eligible Season" means a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club's practice, developmental, or taxi squad roster for at least eight (8) regular or postseason games; or (ii) on a World League of American Football, NFL Europe League, or NFL Europa League team's active roster on the date of three (3) or more regular season or postseason games or on the active roster on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on the World League of American Football, NFL Europe League, or NFL Europa League injured reserve list or team inactive list due to a concussion or head injury.</i></p>



**Exhibit A: June 2014 Settlement Terms and Added Value of Improvements**

<b>June 2014 Settlement Terms</b>	<b>Added Value of Improvements</b>
<p>and pharmaceuticals) for that condition during the ten year term of the BAP or within five years from diagnosis, whichever is later.</p> <p><u>Participation in a baseline assessment exam:</u> Although all retired players are encouraged to take advantage of the BAP and receive a baseline examination, they do not need to participate in the BAP to receive a monetary award. There is a 10% reduction to the monetary award if the retired player does not participate in the BAP and:</p> <ul style="list-style-type: none"> <li>• Did not receive a Qualifying Diagnosis prior to July 7, 2014, and</li> <li>• Receives a Qualifying Diagnosis (other than ALS) after his deadline to receive a BAP baseline assessment examination.</li> </ul> <p><i>In order to ensure sufficient funds to pay for a baseline assessment examination for each eligible Retired NFL Football Player, as set forth in Section 5.2 and subject to Sections 5.14(a), 23.1(b) and 23.3(d) of this Agreement, the maximum per player BAP Supplemental Benefit payable under this Section, taking into account such factors as the number of Retired NFL Football Players using the BAP and diagnosed with Level 1 Neurocognitive Impairment, shall be determined on the one-year anniversary of the commencement of the BAP by Co-Lead Class Counsel and Counsel for the NFL Parties, in consultation with the BAP Administrator, and with the approval of the Court. The maximum per player benefit will be set at a sufficient level to ensure that there will be sufficient funds, without exceeding the Seventy-Five Million United States Dollars (U.S. \$75,000,000) cap on the BAP Fund, to pay for every eligible Retired NFL Football Player to receive one baseline assessment examination. At the conclusion of the term of the BAP, and at such other times as the Court may direct or as may be requested by Co-Lead Class Counsel or Counsel for the NFL Parties, Co-Lead Class Counsel and Counsel for the NFL Parties will review and adjust, if necessary, this maximum benefit, in consultation with the BAP Administrator and with the approval of the Court, to ensure that there are sufficient funds to pay for all baseline assessment examinations without exceeding the Seventy-Five Million United States Dollar (U.S. \$75,000,000) cap on the BAP Fund.</i></p>	<p><i>Uncapping the BAP Fund to Guarantee a Baseline Assessment for Every Eligible Class Member - The amount of money, up to a maximum of Seventy-Five Million United States dollars (U.S. \$75,000,000), sufficient to make all payments set forth in Section 23.3(d), except that every qualified Retired NFL Football Player, as set forth in Section 5.1, is entitled to one baseline assessment examination. For the avoidance of any doubt, if the Seventy-Five Million United States dollars (U.S. \$75,000,000) is insufficient to cover the costs of one baseline assessment examination for every qualified Retired NFL Football Player electing to receive an examination by the deadline set forth in Section 5.3, the NFL Parties agree to pay the amount of money necessary to provide the examinations in accordance with this Settlement Agreement.</i></p>

**Exhibit A: June 2014 Settlement Terms and Added Value of Improvements**

<b>June 2014 Settlement Terms</b>	<b>Added Value of Improvements</b>
<p><b>Monetary Awards Fund (MAF)</b></p> <p>Monetary awards are available for the diagnosis of ALS, Parkinson’s Disease, Alzheimer’s Disease, Level 2 Neurocognitive Impairment (i.e., moderate Dementia), Level 1.5 Neurocognitive Impairment (i.e., early Dementia), or Death with CTE (the “Qualifying Diagnoses”). A Qualifying Diagnosis may occur at any time until the end of the 65 year term of the Monetary Award Fund.</p> <p>Retired NFL Football Players and Representative Claimants for retired players who are diagnosed by the date of Final Settlement Approval must submit claims for monetary awards within two years of the date that further notice about the registration process and deadlines is posted on <a href="http://www.NFLConcussionSettlement.com">www.NFLConcussionSettlement.com</a>. Retired NFL Football Players and Representative Claimants for retired players who are diagnosed after the date of Final Settlement Approval have two years from the date of diagnosis to file claims. This deadline may be extended to within four years of the Qualifying Diagnosis or the date that further notice about the registration process and deadlines is posted on <a href="http://www.NFLConcussionSettlement.com">www.NFLConcussionSettlement.com</a>, whichever is later, if the Retired NFL Football Player or Representative Claimant can show substantial hardship beyond the Qualifying Diagnosis. Derivative Claimants must submit claims no later than 30 days after the Retired NFL Football Player through whom the close relationship is the basis for the claim (or the Representative Claimant of that retired player) receives a notice that he is entitled to a monetary award. All claims must be submitted by the end of the 65-year term of the Monetary Award Fund.</p> <p><i>Any Settlement Class Member taking an appeal will be charged a fee of One Thousand United States dollars (U.S. \$1,000) by the Claims Administrator that must be paid before the appeal may proceed, which fee will be refunded if the Settlement Class Member’s appeal is successful. If the appeal is unsuccessful, the fee will be paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.</i></p> <p>If a retired player receives a monetary award based on a Qualifying Diagnosis, and later is diagnosed with a different Qualifying Diagnosis that entitles him to a larger monetary award than his previous award, he will be eligible for an increase in compensation. This would also apply to Derivative Claimants.</p> <p>Qualifying Diagnoses must be made by approved qualified specialists. If and when Final Settlement Approval is obtained, the Claims Administrator will create and maintain a list of specialists who may make an authorized Qualifying Diagnoses if no such</p>	<p><i>The Expanded Scope of the Death with CTE Qualifying Diagnosis - A Qualifying Diagnosis of Death with CTE shall be made only for Retired NFL Football Players who died prior to the Final Approval Date, through a post-mortem diagnosis made by a board-certified neuropathologist prior to the Final Approval Date (April 22, 2015), provided that a Retired NFL Football Player who died between July 7, 2014 and the Final Approval Date (April 22, 2015) shall have until 270 days from his date of death to obtain such a post-mortem diagnosis.</i></p> <p><i>Elimination of the \$1,000 Appeal Fee in Cases of Financial Hardship - Settlement Class Members may make a hardship request to the Claims Administrator and ask that the fee of One Thousand United States dollars (U.S. \$1,000) be waived for good cause. The Claims Administrator will require that the Settlement Class Member provide such financial information as may be necessary to decide the request to waive the fee, which request shall be approved or denied in the Claims Administrator’s sole discretion.</i></p>



**Exhibit A: June 2014 Settlement Terms and Added Value of Improvements**

June 2014 Settlement Terms	Added Value of Improvements																																																																						
<p>diagnosis has already been made by a qualified specialist before the Settlement is effective.</p> <p>The amount of money Class Members will receive depends on the retired player’s:</p> <ul style="list-style-type: none"><li>• Specific Qualifying Diagnosis (see definition above),</li><li>• Age at the time of diagnosis (see definition below),</li><li>• <i>Number of seasons played or practiced in the NFL or the AFL (see Eligible Seasons definition above in the BAP section) (see table below listing reductions to monetary award if the retired player has less than five Eligible Seasons),</i></li><li>• Diagnosis of a prior stroke or traumatic brain injury (see definition below), and</li><li>• Participation in a baseline assessment exam (see Participation in a baseline assessment exam definition above in the BAP section).</li></ul> <p>The amount of money you will receive also depends on whether:</p> <ul style="list-style-type: none"><li>• There are any legally enforceable liens on the award,</li><li>• Any retainer agreement with an attorney, and</li><li>• The Court makes any further assessments.</li></ul> <p><u>Age at the time of diagnosis:</u> Awards are reduced for retired players who were 45 or older when diagnosed. The younger a retired player is at the time of diagnosis, the greater the award he will receive. Setting aside the other downward adjustments to monetary awards (all are described above), the table below provides:</p> <ul style="list-style-type: none"><li>• The average award for people diagnosed between the ages of 45-79; and</li><li>• The amount of the award for those under age 45 and over 79.</li></ul> <p>The actual amount will be determined based on each retired player’s actual age at the time of diagnosis and on other potential adjustments.</p>	<p><i>Eligible-Season Credit for Seasons Played in NFL Europe - “Eligible Season” means a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club’s Active List on the date of three (3) or more regular season or postseason games; or (ii) on a Member Club’s Active List on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on a Member Club’s injured reserve list or inactive list due to a concussion or head injury. A “half of an Eligible Season” means a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club’s practice, developmental, or taxi squad roster for at least eight (8) regular or postseason games; or (ii) on a World League of American Football, NFL Europe League, or NFL Europa League team’s active roster on the date of three (3) or more regular season or postseason games or on the active roster on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on the World League of American Football, NFL Europe League, or NFL Europa League injured reserve list or team inactive list due to a concussion or head injury.</i></p>																																																																						
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**Exhibit A: June 2014 Settlement Terms and Added Value of Improvements**

<b>June 2014 Settlement Terms</b>	<b>Added Value of Improvements</b>																						
<p>Note: The age of the retired player at diagnosis (not the age when applying for a monetary award) is used to determine the monetary amount awarded.</p> <p><u>Diagnosis of a prior stroke or traumatic brain injury:</u> A retired player's monetary award (or his Representative Claimant monetary award) will be reduced by 75% if he experienced: (1) a medically diagnosed stroke that occurred before or after the time the retired player played NFL football, but before he received a Qualifying Diagnosis; or (2) a severe traumatic brain injury unrelated to NFL football that occurred during or after the time the retired player played NFL football, but before he received a Qualifying Diagnosis. The award will not be reduced if the retired player (or his Representative Claimant) can show by clear and convincing evidence that the stroke or traumatic brain injury is not related to the Qualifying Diagnosis.</p> <p><u>Table listing reductions to monetary award if the retired player has less than five Eligible Seasons:</u> The table below lists the reductions to a retired player's (or his Representative Claimant's) monetary award if the retired player has less than five Eligible Seasons. To determine the total number of Eligible Seasons credited to a retired player, add together all of the earned Eligible Seasons and half Eligible Seasons. For example, if a retired player earned two Eligible Seasons and three half Eligible Seasons, he will be credited with 3.5 Eligible Seasons.</p> <table border="1" data-bbox="207 1171 1019 1417"> <thead> <tr> <th>NUMBER OF ELIGIBLE SEASONS</th><th>PERCENTAGE OF REDUCTION</th></tr> </thead> <tbody> <tr><td>4.5</td><td>10%</td></tr> <tr><td>4</td><td>20%</td></tr> <tr><td>3.5</td><td>30%</td></tr> <tr><td>3</td><td>40%</td></tr> <tr><td>2.5</td><td>50%</td></tr> <tr><td>2</td><td>60%</td></tr> <tr><td>1.5</td><td>70%</td></tr> <tr><td>1</td><td>80%</td></tr> <tr><td>.5</td><td>90%</td></tr> <tr><td>0</td><td>97.5%</td></tr> </tbody> </table>	NUMBER OF ELIGIBLE SEASONS	PERCENTAGE OF REDUCTION	4.5	10%	4	20%	3.5	30%	3	40%	2.5	50%	2	60%	1.5	70%	1	80%	.5	90%	0	97.5%	
NUMBER OF ELIGIBLE SEASONS	PERCENTAGE OF REDUCTION																						
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Category	June 2014 Settlement Terms	Added Value of Improvements				
		Uncapping the BAP Fund	Difference	NFL Europe Eligible Season Credit	Difference	Total Difference
<b>Administrative costs</b>	\$ 7,500,000	\$ 7,500,000	\$ -	\$ 7,500,000	\$ -	\$ -
<b>Cost of Baseline Assessment Examination</b>						
Total Former Players Potentially Eligible for Compensation	21,070	21,070		21,070		
Total NFL Europe Players Eligible for Compensation	(2,302)	(2,302)		-		
Claims already submitted with a Diagnosed Disease	(96)	(96)		(96)		
Deceased, 2000-2013 - filed complaint	(76)	(76)		(76)		
Deceased, 2000-2013 - did not file complaint	(1,636)	(1,636)		(1,636)		
Total Class Members Eligible for Compensation	16,960	16,960		19,262		
Settlement Participation Rate	70%	100%		100%		
Total Settlement Participating Eligible Players	11,790	16,960		19,262		
Of Eligible Class Members - BAP Participation Rate	100%	100%		100%		
Total BAP Participating Eligible Class Members	11,790	16,960		19,262		
Estimated cost per exam	\$ 3,500	\$ 3,500		\$ 3,500		
<b>Cost of Baseline Assessment Examination</b>	<b>\$ 41,265,000</b>	<b>\$ 59,360,000</b>	<b>\$ 18,095,000</b>	<b>\$ 67,417,000</b>	<b>\$ 8,057,000</b>	<b>\$ 26,152,000</b>
<b>Amount available for Supplemental Benefits</b>						
Eligible Class Members estimated to have Level 1 Neurocognitive Impairment	750	1,079	329	1,225	146	475
Percent of Eligible Class Members who will require medical treatment for Level 1 Neurocognitive Impairment	6.4%	6.4%		6.4%		
Average Value of Supplemental Benefit	\$ 35,000	\$ 35,000		\$ 35,000		
<b>Amount available for Supplemental Benefits</b>	<b>\$ 26,250,000</b>	<b>\$ 37,760,814</b>	<b>\$ 11,510,814</b>	<b>\$ 42,886,132</b>	<b>\$ 5,125,318</b>	<b>\$ 16,636,132</b>
<b>Total BAP Funds</b>	<b>\$ 75,015,000</b>	<b>\$ 104,620,814</b>	<b>\$ 29,605,814</b>	<b>\$ 117,803,132</b>	<b>\$ 13,182,318</b>	<b>\$ 42,788,132</b>

**Notes:**

- [1] Document 6423-21, Declaration of Thomas Vasquez Ph.D., pg. 9.  
[2] Document 6167, Material Provided by Counsel to the Plaintiffs, Seeger Weiss LLP, pg. 14.  
[3] Document 7070-2, Declaration of Steven F. Molo in Support of Petition for an Award of Attorneys' Fees and Expenses, Exhibit 11 pg. 81.  
[4] Document 6423-21, Declaration of Thomas Vasquez Ph.D., pg. 8.  
[5] Calculating total benefit added by removing the cap (Due to the removed cap the added value assumes all members eligible and alive are going to participate).  
[6] Document 6423-21, Declaration of Thomas Vasquez Ph.D., Exhibit B pg. 38.  
[7] Document 6168, Material Provided by Counsel to the NFL, Paul, Weiss, Rifkind, Wharton & Garrison LLP, pg. 43.

Category	June 2014 Settlement Terms			Added Value of Improvements	
	Count	Amount	Funding [2]	Amount	Difference
<b>Qualifying Diagnoses</b>					
ALS	18	\$ 49,400,000	\$ 35,724,234	\$ 35,724,234	[1]
Death with CTE through 7/7/2014	46	64,900,000	\$ 46,933,255	46,933,255	[1]
Parkinson's	14	3,200,000	\$ 2,314,120	2,314,120	[1]
Alzheimer's	1,757	474,900,000	\$ 343,429,934	343,429,934	[1]
Level 2	1,761	341,000,000	\$ 246,598,457	246,598,457	[1]
Level 1.5	-	-	\$ -	-	[1]
<b>Total MAF</b>	<b>3,596</b>	<b>\$ 933,400,000</b>	<b>\$ 675,000,000</b>	<b>\$ 675,000,000</b>	
<b>Expanded Scope of Death with CTE Qualifying Diagnosis</b>					
Average MAF for Death with CTE				\$ 421,000	[3]
Population of Players who Died with CTE in the Extended Timeframe				111	[3]
Percent of CTE in NFL Population as Reported in Prior Studies				96%	[4]
Total Estimated to have CTE in the Extended Timeframe				106	
<b>Estimated Added Value</b>				<b>\$ 44,626,000</b>	
<b>Elimination of Appeal Fee</b>					
NFL Disability Claim Applicants				1,052	[5]
NFL Disability Claim Applicants Originally Accepted				358	[5]
NFL Disability Claim Applicants Originally Denied, then Accepted during Appeal Process				69	[5]
Total Accepted NFL Disability Claim Applicants				427	[5]
Percent of NFL Disability Claim Applicants Originally Denied, then Accepted during Appeal Process				16%	[5]
Total Accepted NFL MAF Qualifying Diagnosis Applicants				3,596	[1]
Estimated NFL Population Originally Denied, then Accepted During Appeal Process				581	[6]
Percent Deterred from Appealing when Claims are Originally Denied				10%	[6]
NFL Population Deterred from Appealing when Claims are Originally Denied				58	[6]
Average Amount Funded per Eligible Player				\$ 187,709	
<b>Estimated Added Value</b>				<b>\$ 10,907,494</b>	

Category	June 2014 Settlement Terms			Added Value of Improvements	
	Count	Amount	Funding [2]	Amount	Difference
<b>NFL Europe Eligible Seasons Credit</b>					
Total NFL Eligible Seasons				60,350	[7]
Total Monetary Award Fund				\$ 675,000,000	[8]
Average Eligible Class Member Award for a Season				11,185	
NFL Europe Total Eligible Seasons				2,143	[9]
Subtotal				\$ 23,968,931	
NFL Europe Only Players at Zero Eligible Seasons				1,843,676	[10]
<b>Estimated Added Value</b>				\$ 22,125,255	\$ 22,125,255
<b>Total</b>	<b>3,596</b>	<b>\$ 933,400,000</b>	<b>\$ 675,000,000</b>	<b>\$ 752,658,750</b>	<b>\$ 77,658,750</b>

**Notes:**

- [1] Document 6423-21, Declaration of Thomas Vasquez Ph.D., Exhibit B pg. 5.
- [2] The percent of the total June 2014 Settlement Terms Amount associated with each Qualifying Diagnosis was used to estimate the Funding for each Qualifying Diagnosis given the total MAF is \$675 million. Refer to Note 8 below for support for the total MAF.
- [3] Document 7070-2, Declaration of Steven F. Molo in Support of Petition for an Award of Attorneys' Fees and Expenses, Exhibit 12 pgs. 1-5.
- [4] Document 7070-1, Faneca Objectors' Memorandum of Law in Support of Petition for an Award of Attorneys' Fees and Expenses, pg. 26.
- [5] Document 7070-1, Faneca Objectors' Memorandum of Law in Support of Petition for an Award of Attorneys' Fees and Expenses, pg. 27.
- [6] Document 7070-1, Faneca Objectors' Memorandum of Law in Support of Petition for an Award of Attorneys' Fees and Expenses, pg. 28.
- [7] See Exhibit E - Eligible Seasons per Player Analysis.
- [8] Document 6423-21, Declaration of Thomas Vasquez Ph.D., Exhibit B pg. 6.
- [9] Document 7070-2, Declaration of Steven F. Molo in Support of Petition for an Award of Attorneys' Fees and Expenses, Exhibit 11 pg. 81.
- [10] See Exhibit F - NFL Europe Eligible Seasons included in the June 2014 Settlement Terms Analysis.

Age [1]	All Players		Living/Not Yet Filed		Already Filed		Deceased/Not Yet Filed	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent
Under 45	8,354	40%	6,744	44%	1,502	36%	108	7%
45-49	2,368	11%	1,831	12%	487	12%	50	3%
50-54	2,802	13%	2,095	14%	657	16%	50	3%
55-59	1,794	9%	1,261	8%	458	11%	75	5%
60-64	1,514	7%	1,026	7%	371	9%	117	7%
65 - 69	1,291	6%	824	5%	330	8%	137	8%
70 - 74	1,007	5%	604	4%	220	5%	183	11%
75-79	769	4%	419	3%	129	3%	221	14%
80+	1,171	6%	423	3%	53	1%	695	42%
<b>Total:</b>	<b>21,070</b>	<b>100%</b>	<b>15,227</b>	<b>100%</b>	<b>4,207</b>	<b>100%</b>	<b>1,636</b>	<b>100%</b>
<b>Average Age:</b>	<b>50.5</b>	<b>-</b>	<b>47.9</b>	<b>-</b>	<b>51.0</b>	<b>-</b>	<b>73.3</b>	<b>-</b>

**Notes:**

[1] Document 6167, Material Provided by Counsel to the Plaintiffs, Seeger Weiss LLP, pg. 16.

NFL Seasons per NFL Player			
Seasons Played	NFL Eligible Seasons	Player Count	Total Seasons [1]
0	0	2,247	-
1	1	5,041	5,041
2	2	2,719	5,438
3	3	1,940	5,820
4	4	1,564	6,256
5	5	1,366	6,830
6	5	1,232	6,160
7	5	965	4,825
8	5	889	4,445
9	5	802	4,010
10	5	679	3,395
>10	5	1,626	8,130
Total:		21,070	60,350 [2]
NFL Europe Only Players		2,302	- [3]
Grand Total:		18,768	60,350

Eligible Seasons per NFL Player without NFL Europe Only Players: 3.2 [4]

Total NFL Europe Seasons per Player [5][6]			
Seasons Played	Player Count - NFL Europe Seasons	Player Count - NFL Seasons	Total Seasons [7]
1	2,416	497	2,913
2	638	221	1,718
3	111	100	633
4	36	32	272
5	13	20	165
6	5	20	150
7	6	18	168
8	6	6	96
9	2	7	81
10	-	9	90
11	1	-	11
12	-	1	12
13	-	1	13
Grand Total:		3,234	932
			6,322

Eligible Seasons per NFL Europe Player: 1.95 [4]

**Notes:**

- [1] Total Seasons is calculated by multiplying NFL Eligible Seasons by Player Count.
- [2] Document 6167, Material Provided by Counsel to the Plaintiffs, Seeger Weiss LLP, pg. 17.
- [3] Document 7070-2, Declaration of Steven F. Molo in Support of Petition for an Award of Attorneys' Fees and Expenses, Exhibit 11 pg. 81.
- [4] Eligible Seasons per Player is calculated by dividing Total Seasons by Player Count.
- [5] Document 7070-2, Declaration of Steven F. Molo in Support of Petition for an Award of Attorneys' Fees and Expenses, Exhibit 11 pg. 81.
- [6] This table was created to summarize Exhibit 11 (Document 7070-2) and include both the NFL Seasons and NFL Europe Seasons of players who played in NFL Europe.
- [7] Total seasons is calculated by multiplying seasons played by the sum of NFL Seasons and NFL Europe Seasons.



Category	Amount	
Total MAF Amount Funded	\$ 675,000,000	[1]
Total NFL Players	21,070	[2]
Average Amount Funded per NFL Player	\$ 32,036	
NFL Europe Only Players	2,302	[3]
Total Estimated Amount to be paid to NFL Europe Only Players	\$ 73,747,034	
Percentage Multiple for Zero Eligible Seasons	2.5%	
<b>Total Impact</b>	<b>\$ 1,843,676</b>	

**Notes:**

- [1] Document 6423-21, Declaration of Thomas Vasquez Ph.D., Exhibit B pg. 6.
- [2] Document 6167, Material Provided by Counsel to the Plaintiffs, Seeger Weiss LLP, pg. 17.
- [3] Document 7070-2, Declaration of Steven F. Molo in Support of Petition for an Award of Attorneys' Fees and Expenses, Exhibit 11 pg. 81.

## Exhibit B



## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION .....	1
BACKGROUND .....	2
PROCEDURAL HISTORY .....	4
A. The Initial Settlement was rejected by the Court <i>sua sponte</i> . ....	4
B. The Armstrong Objectors file their Objection, Amended Objection, and Supplemental Objection suggesting improvements to the Revised Settlement. ....	6
C. The Court approved the Final Settlement after Class Counsel and the NFL adopted improvements suggested by the Armstrong Objectors. ....	7
1. After the Revised Settlement, final fairness hearing, the Court suggested several improvements mirroring improvements suggested by the Armstrong Objectors. ....	7
2. The Parties adopted the settlement improvements suggested by the Armstrong Objectors and echoed by the Court. The resulting Final Settlement was approved. ....	7
D. The Armstrong Objectors’ Third Circuit and Supreme Court Appeals .....	8
THE ARMSTRONG OBJECTORS INCREASED THE VALUE OF THE SETTLEMENT AND DELIVERED THE COLLATERAL TIME BENEFIT .....	9
A. The Armstrong Objectors’ efforts resulted in guaranteed BAP examinations for all eligible Class Members. ....	10
B. The Armstrong Objectors’ efforts also resulted in an expanded eligibility period for Death with CTE benefits. ....	11
C. The Armstrong Objectors’ efforts also resulted in the \$1,000 appeal fee being waived for good cause. ....	12
D. The Armstrong Objectors' efforts also resulted in the Collateral Time Benefit. ....	13
THE ARMSTRONG OBJECTORS’ REQUESTED FEE AWARD .....	15
ARGUMENTS AND AUTHORITIES .....	17

A. The Armstrong Objectors' productive work merits the requested fee award. ....	18
1. The direct benefit derived from the Armstrong Objectors' challenges to the Revised Settlement and Final Settlement supports the requested fee award. ....	18
2. The direct benefits of the up to \$63.65 million increase in the value of the Final Settlement and the Collateral Time Benefit support the requested fee award. ....	20
3. The requested fee award is reasonable. ....	20
a. The requested fee award is a reasonable percentage of the benefits conferred. ....	20
b. The Gunter/Prudential factors support the requested fee award. ....	21
i. The size of the fund created by the Armstrong Objectors' Counsel's efforts supports the requested fee award ....	22
ii. The number of beneficiaries supports the requested fee award. ....	22
iii. The value of benefits attributable to the Armstrong Objectors' Counsel's efforts relative to the efforts of other objectors supports the requested fee award ....	23
iv. The complexity and duration of the litigation support the requested fee award. ....	23
v. The Armstrong Objectors' Counsel's skill, efficiency, and amount of time devoted to the case supports the requested fee award. ....	24
vi. The risk of non-payment supports the requested fee award ....	24
vii. Fee awards in similar cases support the requested fee award. ....	24
viii. The percentage fee that would have been negotiated in a private contingent fee arrangement supports the requested fee award. ....	25
ix. The innovative terms of the settlement improvements secured by the Armstrong Objectors' Counsel support the requested fee award. ....	26

B. The requested fee award should be paid from the Attorneys' Fees Qualified Settlement Fund .....	27
---	----

# **TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>In re Avandia Mktg., Sales Practices &amp; Prods. Liab. Litig.</i> , No. 07-MD-01871, 2012 WL 6923367 (E.D. Pa. Oct. 19, 2012).....	25
<i>In re Cardinal Health, Inc. Sec. Litig.</i> , 550 F. Supp.2d 751 (S.D. Ohio 2008) .....	18
<i>In re Cendant Corp. PRIDES Litig.</i> , 243 F.3d 722 (3d Cir. 2001).....	1, 17, 20
<i>Dewey v. Volkswagen of Am.</i> , 909 F. Supp.2d 373 (D.N.J. 2012) .....	3, 21, 25
<i>In re Diet Drugs Prods. Liab. Litig.</i> , 582 F.3d 524 (3d Cir. 2009).....	22
<i>In re Domestic Air Transp. Antitrust Litig.</i> , 148 F.R.D. 297 (N.D. Ga. 1993).....	16, 18
<i>Eubank v. Pella Corp.</i> , 753 F.3d 718 (7th Cir. 2014) .....	18
<i>Frankenstein v. McCrory Corp.</i> , 425 F. Supp. 762 (S.D.N.Y. 1977).....	19
<i>In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.</i> , 55 F.3d 768 (3d Cir. 1995).....	18, 23
<i>Great Neck Capital Appreciation Inv. P’ship, LP v. PricewaterhouseCoopers, LLP</i> 212 F.R.D. 400 (E.D. Wis. 2002) .....	17, 27
<i>Howes v. Atkins</i> , 668 F. Supp. 1021 (E.D. Ky. 1987) .....	19
<i>In re Ikon Office Sols., Inc., Sec. Litig.</i> , 194 F.R.D. 166 (E.D. Pa. 2000).....	18, 22, 25, 27

<i>In re Ins. Brokerage Antitrust Litig.</i> , 297 F.R.D. 136 (D.N.J. 2013).....	26
<i>Kirchoff v. Flynn</i> , 786 F.2d 320 (7th Cir. 1986) .....	25
<i>Lan v. Ludrof</i> , No. 1:06-cv-114, 2008 WL 763763 (W.D. Pa. 2008) .....	21
<i>In re Linerboard Antitrust Litig.</i> , No. 98-5055, 2004 WL 1221350 (E.D. Pa. June 2, 2004) .....	26
<i>McDonough v. Toys “R” Us, Inc.</i> , 80 F. Supp.3d 626 (E.D. Pa. 2015) .....	20, 22, 24
<i>In re Nat’l Football League Players’ Concussion Injury Litig.</i> , 821 F.3d 410 (3d Cir. 2016).....	20
<i>In re Nat’l Football League Players’ Concussion Injury Litig.</i> , 961 F. Supp.2d 708 (E.D. Pa. 2014).....	9, 20
<i>In re Prudential Ins. Co. of Am. Sales Practices Litig.</i> , 273 F. Supp.2d 563 (D.N.J. 2003) .....	5
<i>In re Prudential Ins. Co. Am. Sales Practices Litig. Agent Actions</i> , 148 F.3d 283 (3d Cir. 1998) .....	22
<i>In re Shell Oil Refinery</i> , 155 F.R.D. 552 (E.D. La. 1993).....	27
<i>White v. Auerbach</i> , 500 F.2d 822 (2d Cir. 1974) .....	1, 20
<b><u>Rules of Civil Procedure</u></b>	
FED. R. CIV. P. 23(a)(4) .....	19, 23
FED. R. CIV. P. 23(E) .....	19
FED. R. CIV. P. 23(H) .....	1



**Other Authorities**

7B CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE	
§ 1803 (3d ed. 2004) .....	17

Pursuant to FED. R. CIV. P. 23(h), Objectors Raymond Armstrong, Larry Barnes, Larry Brown, Drew Coleman, Kenneth Davis, William B. Duff, Kelvin Mack Edwards, Sr., Phillip E. Epps, Gregory Evans, Charles L. Haley, Sr., Mary Hughes, James Garth Jax, Ernest Jones, Michael Kiselak, Dwayne Levels, Darryl Gerard Lewis, Gary Wayne Lewis, Jeremy Loyd, Lorenzo Lynch, Tim McKyer, David Mims, Clifton L. Odom, Evan Ogelsby, Solomon Page, Hurles Scales, Jr., Barbara Scheer, Kevin Rey Smith, Willie T. Taylor, George Teague, and Curtis Bernard Wilson (collectively, the “Armstrong Objectors”) respectfully move for an award of attorneys’ fees, stating the following:

### **INTRODUCTION**

“[I]t is well settled that objectors have a valuable and important role to perform in preventing . . . unfavorable settlements, and . . . they are entitled to an allowance as compensation for attorneys’ fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts.” *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 743 (3d Cir. 2001) (quoting *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974)).

The Armstrong Objectors, therefore, respectfully request an award of their Counsel’s straight time, hourly attorneys’ fees with no multiplier reflecting the role they played in significantly enhancing the Revised Settlement that became the Final Settlement and, in the process, delivering a collateral benefit to Class Members in the form of additional valuable time (over 19 months)<sup>1</sup> to be examined by a board certified neuro-specialist physician of their choice (for purposes of securing a Qualifying Diagnosis for a monetary award), rather than being examined by a physician selected for them by the NFL and Class Counsel.

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<sup>1</sup> The additional 19-month period hereafter will be referred to as the “Collateral Time Benefit.” Securing the Collateral Time Benefit was not the purpose for filing the Armstrong Objectors’ appeals. Although lagniappe, it is a Class Member benefit delivered by the Armstrong Objectors just the same.

## **BACKGROUND**

The Armstrong Objectors are thirty-four former NFL players and family members of players with distinguished playing careers. The Armstrong Objectors collectively played an average of over six seasons with over twenty different teams. They include offensive and defensive linemen, linebackers, defensive backs, wide receivers, tight ends and a running back. The Armstrong Objectors include All-Americans, Pro Bowl selections, Super Bowl champions, and a Super Bowl MVP. The oldest Armstrong Objector began his NFL career in 1946. The youngest Armstrong Objector retired after the 2011 season. One played on five Super Bowl Championship teams, three played on three Super Bowl Championship teams, one played on one Super Bowl Championship team, and one played in NFL Europe. The Armstrong Objector group was the second largest objector group.

The central dispute before this Court was whether the ultimate settlement reached by the NFL and Class Counsel was fair, adequate, and reasonable. Class Counsel and counsel for the NFL engaged in preliminary motion practice, briefing and arguing a motion to dismiss on the question of whether federal labor law preempted the action. Then, at the Court's direction, the case was mediated and settled (the "Initial Settlement"). There was no decision on the motion to dismiss, no discovery, no contested class certification, no summary judgment practice, and no bellwether trial. This case, therefore, was all about the negotiated settlement.

However, as this Court recognized *sua sponte*, the Initial Settlement was inadequate. Then came a Revised Settlement, to which the Armstrong Objectors objected by—

- (i) Raising key legal issues, several of which were novel and complex;
- (ii) Leading the objectors' efforts that resulted in revisions to the Revised Settlement giving rise to the Final Settlement, with its value enhanced by as much as \$63.65 million;

- (iii) Leading the efforts to test the Final Settlement on appeal at the Third Circuit Court of Appeals, which also provided the Collateral Time Benefit to Class Members; and
- (iv) When others stopped, testing the Final Settlement further on appeal at the United States Supreme Court, which provided an additional Collateral Time Benefit to Class Members.

The Armstrong Objectors' hard work spanned a three year period. All told, the Armstrong Objectors' Counsel—the Coffman Law Firm, Weller, Green, Toups & Terrell, LLP, the Webster Law Firm, and the Warner Law Firm—collectively spent more than 1175 hours and advanced more than \$70,000 of out-of-pocket expenses working on this matter. They did so on a 100% contingency basis, with full risk of non-payment.

In addition to enhancing the overall settlement, the Armstrong Objectors' extensive work “transform[ed] the settlement hearing into a truly adversarial proceeding.” *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 395 (D.N.J. 2012) (quotation marks omitted) (awarding objectors' counsel fees). The result of that “truly adversarial” fairness hearing is a vastly improved Final Settlement that provides more relief for a more Class Members than the prior versions of the settlement advanced by Class Counsel and the NFL. Equally as important, the fairness of the Final Settlement has been tested through high-level advocacy—allowing the courts, Class Members, and the public to conclude that the result achieved, while not perfect, is just.

The Armstrong Objectors, therefore, respectfully request a fee award commensurate with their hard work transforming the process into a truly adversarial proceeding, enhancing the overall value of the settlement, and delivering the Collateral Time Benefit to Class Members. In doing so, the Armstrong Objectors do not object to the attorneys' fees and expenses sought by Class Counsel (Doc. #7151)—provided, of course, that the Armstrong Objectors' Counsel's requested attorneys' fees also are paid.

## **PROCEDURAL HISTORY**

### **A. The Initial Settlement was rejected by the Court *sua sponte*.**

In 2011, several retired NFL players and their families sued the NFL, alleging the NFL misled them about the risks of repeated multiple traumatic brain injury (“MTBI”) and breached its duty to protect players’ health and safety. The cases were consolidated in this Court.

The NFL moved to dismiss the cases on preemption grounds. While the NFL’s motion was pending, the Court ordered the Parties to mediation. In August 2013, Class Counsel and the NFL announced the Initial Settlement.

Thereafter, Class Counsel filed a putative Class Action Complaint on behalf of Kevin Turner and Shawn Wooden as representatives of all retired NFL players. Class Counsel simultaneously filed a motion for preliminary approval of the Initial Settlement. Doc. #5634. The Initial Settlement created a Monetary Award Fund (“MAF”), capped at \$675 million, to compensate retired players diagnosed with one of five specific Qualifying Diagnoses. Despite the numerous diseases and symptoms linked to MTBI alleged in the Class Action Complaint, the MAF provided awards only for individuals diagnosed with Parkinson’s disease, Alzheimer’s disease, ALS, and sufficiently severe dementia (“Level 1.5” and “Level 2” neurocognitive impairment).

The Initial Settlement, however, did not provide for an ongoing award for chronic traumatic encephalopathy (“CTE”)—even though CTE was the disease at the heart of the Class Action Complaint and many of the precursor lawsuits. Instead, the Initial Settlement provided “Death with CTE” benefits only for players who died and received a post-mortem diagnosis of CTE before preliminary approval of the Initial Settlement.

The Initial Settlement also applied several criteria to determine each claimant’s award, including a maximum award for each Qualifying Diagnosis, subject to being reduced depending

on the player's age and the number of seasons played in the NFL (with at least five "eligible seasons" being required for a full award). The Initial Settlement "specifically excluded" seasons played in NFL Europe (or the NFL's other European leagues) from eligible-season credit, even though it fully released players' claims for injuries suffered while playing in NFL Europe. The Initial Settlement also reduced awards by 75% for players who suffered a single stroke, or a single instance of traumatic brain injury not related to NFL play and imposed a \$1,000 fee on Class Members who appeal adverse determinations of their MAF claims.

The Initial Settlement also created a Baseline Assessment Program ("BAP") Fund (capped at \$75 million), which would provide players with an examination to establish a baseline of each player's neurocognitive functioning. But not every Class Member was entitled to such an examination. Only Class Members with at least half of an eligible season could participate in the BAP. The BAP examination also would screen players for dementia or neurocognitive impairment. Players diagnosed with "Level 1" neurocognitive impairment by the examination could receive "supplemental benefits" to cover the cost of treatment.

Slightly over a week after Class Counsel filed their motion for preliminary approval of the Initial Settlement, the Court *sua sponte* denied the motion. *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 716 (E.D. Pa. 2014). Noting its "duty to protect the rights of all potential class members" (*id.* at 710), the Court declined to preliminarily approve the Initial Settlement because the MAF lacked "the necessary funds to pay Monetary Awards for Qualifying Diagnoses." *Id.* at 715.

Six months later, on June 25, 2014, Class Counsel submitted a Revised Settlement with a motion for preliminary approval. Doc. #6073. The Revised Settlement addressed the Court's concerns by eliminating the \$675 million cap on the MAF. The Revised Settlement also retained,

among other things, the \$75 million cap on the BAP Fund (*id.* at 4), continued to deny any credit for seasons played in NFL Europe (Doc. #6087 § 2.1(kk)), and retained the 75% reductions for stroke or non-NFL TBI (*id.* § 6.7(b)(ii)-(iii)). On July 7, 2014, the Court preliminarily approved the Revised Settlement. Doc. #6084

**B. The Armstrong Objectors file their Objection, Amended Objection, and Supplemental Objection suggesting improvements to the Revised Settlement.**

Rather than wasting the time and resources of the Court, the appellate court, and the Parties by seeking to intervene in the action, opposing preliminary approval of the Revised Settlement, and appealing preliminary approval of the Revised Settlement to the Third Circuit—as other objectors did—the Armstrong Objectors played by the rules and filed their Objection to the Revised Settlement.

Paragraph 4(h) of the preliminary approval order (Doc. #6084) established October 14, 2014 as the deadline to object to the Revised Settlement, referencing the attached Long Form Notice (Doc. #6084-1) for the precise objection procedure. FAQ No. 35 in the Long Form Notice required all objections to be mailed to the Clerk of the Court for the Eastern District of Pennsylvania. So, on September 3, 2014, *more than a month before the objection deadline*, and long before any objections were *filed* on the Court's ECF, the Armstrong Objectors mailed their Objection to the Clerk of the Court as directed by the Court's preliminary approval order. The Court eventually filed the Armstrong Objectors' Objection on the ECF. Doc. #6353.

Later, on October 13, 2014, after additional former NFL players joined the Armstrong Objector group, the Armstrong Objectors overnighted their Amended Objection to the Court. The Court also filed their Amended Objection on the ECF. Doc. #6233. Thereafter, on April 13, 2015, the Armstrong Objectors filed a Supplemental Objection on the ECF. Doc. #6503.

In their comprehensive Objection (Doc. #6353) and Amended Objection (Doc. #6233), the Armstrong Objectors articulated sixteen detailed, multi-part objections to the Revised Settlement, as well as concrete proposals for curing the defects—including, among others, opening up the BAP, extending the Death with CTE benefits eligibility period, and eliminating the \$1,000 appeal fee.

**C. The Court approved the Final Settlement after Class Counsel and the NFL adopted improvements suggested by the Armstrong Objectors.**

**1. After the Revised Settlement, final fairness hearing, the Court suggested several improvements mirroring improvements suggested by the Armstrong Objectors.**

On November 19, 2014, the Court conducted the final fairness hearing on the Revised Settlement. Thereafter the Court issued an order suggesting five specific improvements that, in the Court's view, would "enhance the fairness, reasonableness, and adequacy of" the Revised Settlement. Doc. #6479. Among other things, the Court opined that the "settlement should assure that all living Retired NFL Football Players who timely register for the Settlement" receive a BAP baseline examination. *Id.* The Court also urged that the "Qualifying Diagnosis of Death with CTE" should include players who die between the dates of preliminary approval and final approval, thereby extending the eligibility period. *Id.* And the Court recommended that the Revised Settlement provide a hardship provision under which the \$1000 appeal fee could be waived. *Id.* Each of these suggestions addressed defects in the Revised Settlement rooted in the objections first lodged by the Armstrong Objectors. *See* Objection (Doc. #6353).

**2. The Parties adopted the settlement improvements suggested by the Armstrong Objectors and echoed by the Court. The resulting Final Settlement was approved.**

On February 13, 2015, Class Counsel and the NFL submitted a Final Settlement containing provisions addressing each of the Court's above suggestions. Doc. #6481. The improvements mirrored those suggested by the Armstrong Objectors.



Among other things, the Final Settlement ensured that every retired player eligible to receive a BAP examination would receive one. *Id.* at 4. It also extended eligibility for Death with CTE benefits to players who died before the final approval date (April 22, 2015), rather than those who died before the preliminary approval date (July 7, 2014)—a nine month *plus* extension. *Id.* at 4-5. And it adopted the Court’s suggestion regarding the appeal fee hardship provision. *Id.* at 5. The Court granted final approval to the Final Settlement on April 22, 2015. Doc. #6510.

#### **D. The Armstrong Objectors’ Third Circuit and Supreme Court Appeals**

In May 2015, twelve groups of objectors (a total of 93 appellants)—led by the Armstrong Objectors—appealed the Court’s final approval order. On appeal, the Armstrong Objectors (i) argued that the Final Settlement’s substance (terms) and procedure (structure of the negotiations) improperly resulted in Death with CTE benefits being awarded to present claimants at the expense of future claimants (*i.e.*, the disparate treatment between former players diagnosed with CTE before final approval, and those diagnosed after final approval), (ii) argued that the Parties’ attempt to delay scrutiny of attorneys’ fees until after final approval was a denial of due process, and (iii) offered several solutions for the Final Settlement’s structural defects, including appointing independent counsel, excluding future CTE claims from the release, compensating CTE with evolving diagnostic criteria, and providing back-end opt-out rights to protect future claimants. *See* Armstrong Objectors’ Corr. Brief (filed Sept. 14, 2015 in the Third Circuit).

Oral argument in the Third Circuit was scheduled for November 19, 2015. Noted appellate advocate, Deepak Gupta (“Gupta”), of Gupta Wessler, PLLC in Washington, D.C., one of the Armstrong Objectors’ Counsel, took the lead, organizing counsel for 87 of the 93 appellants. *See* Joint Proposal of Appellants Regarding Oral Argument (filed Oct. 29, 2015 in the Third Circuit)

(noting that “[t]he Faneca Objectors (representing 4 of the 93 objectors) have indicated that they do not consent to our proposal, but have not provided a counterproposal.”).

When the Joint Proposal was denied by the Third Circuit, Gupta again organized appellants’ counsel and submitted a Revised Joint Proposal on Division of Argument Time (filed Nov. 13, 2015 in the Third Circuit). This time, the Faneca Objectors got on board. *Id.*

Gupta took the lead at oral argument, addressing the inadequate representation of future injury claimants in the Final Settlement, addressing the attorneys’ fee deferral issue, and handled a portion of the rebuttal. *See* Transcript of the November 19, 2015 Third Circuit oral argument at 29:20-52:13; 114:1-124:9. Indeed, the justices were most interested in the topics presented by Gupta as he addressed them longer than any other appellant’s lawyer. *Id.*

On April 18, 2016 (amended May 2, 2016), the Third Circuit, in a 70-page opinion, affirmed the Court’s order granting final approval of the Final Settlement. *See In re Nat’l Football League Players’ Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016). And even though as a direct result of the Armstrong Objectors’ efforts, the Final Settlement was improved substantially and its fairness tested, their job was not yet finished.

When others gave up, the Armstrong Objectors pressed on. Believing in their position—their courage never wavering—they filed a petition for writ of *certiorari* with the United States Supreme Court. Although the Supreme Court ultimately denied their petition on December 12, 2016, they never gave up fighting to improve the Final Settlement for their fellow Class Members, securing for the Class Members the critical Collateral Time Benefit in the process.

**THE ARMSTRONG OBJECTORS INCREASED THE VALUE OF THE SETTLEMENT  
AND DELIVERED THE COLLATERAL TIME BENEFIT**

The improvements to the Revised Settlement that became the Final Settlement—all of which are the direct result of the Armstrong Objectors’ efforts—can fairly be valued at up to \$63.65

million. Based on the Armstrong Objectors' Objections, the Court encouraged the settling Parties to ensure that every eligible Class Member receives a BAP examination, expand the Death with CTE benefits eligibility period, and waive the \$1,000 appeal fee in cases of financial hardship. Class Members will benefit enormously from these settlement enhancements. But there's more. The Armstrong Objectors' also provided Class Members with the Collateral Time Benefit.

**A. The Armstrong Objectors' efforts resulted in guaranteed BAP examinations for all eligible Class Members.**

The Final Settlement entitles many Class Members to receive a BAP baseline examination when, under the Revised Settlement, they would not have received one. Thanks to the Armstrong Objectors' efforts, players who might not have otherwise been able to have their health evaluated and a course of treatment charted will now be able to do so. The benefits to the quality of life for these former players and their families exceed any monetary value that could be placed on this settlement benefit. But a monetary value can be assigned to this benefit nonetheless.

The Revised Settlement capped the BAP Fund at \$75 million. Doc. #6087 § 23.3(d). Under the Final Settlement, however, every eligible Class Member will receive a BAP examination due to the Armstrong Objectors' efforts. Doc. #6481-1 §§ 23.1(b), 23.3(d). The NFL's actuary estimated that \$27 million in supplemental benefits would be paid from the BAP Fund. Doc. #6168 ¶ 54. Separately, the total cost of baseline examinations—each worth \$3500 (Doc. #6423-21 ¶ 24)—for the 16,962 living Class Members<sup>2</sup> eligible for an examination could reach \$59.4 million (*i.e.*, 16,962 eligible Class Members times \$3500). *See* Doc. #6167 at 18 (Table 4-3);

<sup>2</sup> According to Class Counsel's actuary, 15,227 Class Members have not yet filed a complaint, while 4207 Class Members have. Doc. #6167 at 18 (Table 4-3). Of the 4207 Class Members who have filed a complaint, however, 76 are deceased and will not participate in the BAP. *Id.* at 14 (Table 4-1 n.1). Another 96 have already received a qualifying diagnosis and will also not participate. *See* Doc. #6423-21 ¶ 23. Since according to Faneca Objectors' counsel, approximately 2300 Class Members played only in NFL Europe, 16,962 Class Members remain to participate in the BAP.

#6423-21 ¶ 24. The total cost of these two benefits exceeds the original \$75-million cap by \$11.4 million. Thus, eliminating the cap and opening up the BAP could yield an additional benefit to Class Members up to \$11.4 million.

**B. The Armstrong Objectors' efforts also resulted in an expanded eligibility period for Death with CTE benefits.**

The Final Settlement also offers additional relief to Class Members who suffered with CTE by expanding the eligibility period for Death with CTE benefits. Under the Revised Settlement, Class Members who died and were diagnosed with CTE post-mortem after the preliminary approval date would have received nothing. Doc. #6087 Ex. B-1 ¶ 5. Thanks to the Armstrong Objectors' efforts, the Final Settlement extends the time frame for securing a Death with CTE Qualifying Diagnosis—which carries up to a \$4 million award—by over nine months (*i.e.*, from July 7, 2014 to April 22, 2015). Doc. #6481-1 Ex. B-1 ¶ 5.

Between July 7, 2014 and April 22, 2015, 111 Class Members passed away.<sup>3</sup> According to recent Boston University research, CTE was present in the brains of 96% of all deceased NFL players whose brains were examined in an autopsy.<sup>4</sup> Thus, of these 111 deceased Class Members, 106 can be reasonably expected to have CTE and qualify for Death with CTE benefits in an average amount of approximately \$421,000 (accounting for their age at death and number of eligible seasons per player data on NFL.com). Thus, due to the Armstrong Objectors' hard work, the value of the Final Settlement was increased by up to \$44.6-million (*i.e.*, \$421,000 times 106 deceased Class Members who can be reasonably expected to have CTE).

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<sup>3</sup> See *Oldest Living Pro Football Players, 2016-2010 Pro Football Necrology List*, <http://www.oldestlivingprofootball.com/present2010necrology.htm> (last visited Feb. 18, 2017).

<sup>4</sup> Jason M. Breslow, *New: 87 Deceased NFL Players Test Positive for Brain Disease*, FRONTLINE (Sept. 18, 2015), <http://www.pbs.org/wgbh/frontline/article/new-87-deceased-nfl-players-test-positive-for-brain-disease/> (last visited Feb. 18, 2017).

**C. The Armstrong Objectors' efforts also resulted in the \$1,000 appeal fee being waived for good cause.**

To receive a monetary award under the Final Settlement, Class Members must submit a Claim Package to the Claims Administrator, who may approve or deny the claim. Doc. #6481-1 § 9.3. When a claim is denied, the Class Member may appeal to the Court (in consultation with the Appeals Advisory Panel and/or Appeals Advisory Panel Consultant). *Id.* § 9.8. But to do so, the Class Member must pay a \$1,000 appeal fee that will be refunded only if the appeal is successful. *Id.* § 9.6(a).

The Revised Settlement required the appeal fee to be paid regardless of a Class Member's financial circumstances. Doc. #6087 § 9.6(a). Thanks to the Armstrong Objectors' efforts, under the Final Settlement, the appeal fee will be waived "for good cause" (Doc. #6481-1 § 9.6(a)(i))—thereby paving the way for denied claims to be appealed that otherwise would not be appealed and adding significant value to the Final Settlement.

In the NFL's disability-claims process, approximately 16.2% of all claims paid are initially denied, but ultimately paid after appeal.<sup>5</sup> Class Counsel's actuary calculated that 3596 Class Members will be entitled to receive an award under the Final Settlement. Doc. #6167 at 5 (Table 2-1). Assuming the claims process here resembles the NFL disability claims process, about 582 awards will be initially denied, but approved on appeal. If the \$1,000 appeal fee deterred only 5% of those appeals,<sup>6</sup> about 29 Class Members would not receive monetary awards that they

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<sup>5</sup> See L. Elaine Halchin, *Former NFL Players: Disabilities, Benefits, and Related Issues*, Congressional Research Service (April 8, 2008), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1530&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1530&context=key_workplace) (last visited Feb. 18, 2017). From July 1, 1993 to June 26, 2007, 1052 applications for disability benefits were filed. *Id.* Of these applications, 358 were initially approved; another 69 were initially denied, but approved on appeal. *Id.* Thus of the 427 total approvals, 16.2% (69 divided by 427) were approved on appeal.

<sup>6</sup> This is a conservative estimate of the number of Class Members who could not afford the \$1,000 appeal fee. For example, after two years of retirement, 78% of former NFL players are

otherwise would have received under the actuary's calculation. As a result of the Armstrong Objectors' efforts, these anticipated denials will be appealed and the awards paid, adding additional value to Class Members of up to \$7.65 million.<sup>7</sup>

**D. The Armstrong Objectors' efforts also resulted in the Collateral Time Benefit.**

Article VI of the Final Settlement (Doc. #6481-1) provides monetary awards for the Qualifying Diagnoses defined in § 6.3(a). Pursuant to § 6.3(b), *after* the Effective Date of the Final Settlement,<sup>8</sup> Qualifying Diagnoses (other than Death with CTE) may only be made by a Qualified MAF Physician or Qualified BAP Provider approved by Class Counsel and the NFL. See §§ 2.1(www) (referencing § 6.5(a)) for the Qualified MAF Physician selection process; 2.1(vvv) (referencing § 5.7(a)) for the Qualified BAP Provider selection process.

Conversely, pursuant to § 6.3(c), between the preliminary approval date and the Effective Date, Qualifying Diagnoses (other than Death with CTE) may be made by a board certified neurologist, neurosurgeon, or other neuro-specialist physician chosen by a Class Member.

This is litigation wherein the Class Members and the NFL are adversaries. It arose out of Class Members' distrust of the NFL's billionaire owners who allegedly put profits before safety

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under financial stress. Pablo S. Torre, *How (and Why) Athletes Go Broke*, Sports Illustrated (Mar. 23, 2009), <http://www.si.com/vault/2009/03/23/105789480/how-and-why-athletes-go-broke> (last visited Feb. 18, 2017). And, in fact, 15.7% of players file for bankruptcy after twelve years of retirement. See Kyle Carlson et al., *Bankruptcy Rates among NFL Players with Short-Lived Income Spikes*, 105 American Economic Review 5 (April 2, 2015). Indeed, the NFL Player Care Foundation has made charitable grants to 956 former players (5% of the Class) since 2007. See <http://www.nflplayercare.com> (last visited Feb. 18, 2017).

<sup>7</sup> Class Counsel's economic expert estimates there will be 3600 monetary awards totaling \$950 million over the life of the Final Settlement (Doc. #6167 at 3), or an average of \$263,889 per award. The value of 29 additional awards totals over \$7.65 million.

<sup>8</sup> Pursuant to Section 2.1(jj) of the Final Settlement, its Effective Date was January 7, 2017, twenty-five days after the date the Supreme Court denied the Armstrong Objectors' petition for *writ of certiorari*. Absent the Armstrong Objectors' appeals, its Effective Date would have been May 23, 2015 (*i.e.*, thirty days after the Final Settlement was finally approved by the Court on April 22, 2015).



and defrauded Class Members out of their health and well-being. Just because there is a settlement, however, does not mean that Class Members' distrust of the NFL no longer exists. Their mistrust of the NFL is deep-seated and long-standing. It will carry over to the administration of the Final Settlement—especially pertaining to making the Qualifying Diagnoses foundational to Class Members' monetary awards. Whether rightly or wrongly, Class Members fervently believe that they will stand a better chance of receiving a Qualified Diagnosis from a physician they choose, rather than one thrust upon them by Class Counsel and the NFL. If for no other reason, there is value in the additional peace of mind they will have for themselves and their families that they did everything possible to enhance their chances of receiving a monetary award under the Final Settlement.

Although the intent of the Armstrong Objectors' appeals was not to extend the time period in which a Class Member could secure a Qualified Diagnosis from a board certified neuro-specialist physician of his choosing, the fact of the matter is that this collateral benefit was conferred upon Class Members by the Armstrong Objectors' efforts. Appealing the Final Settlement all the way to the Supreme Court provided Class Members with over nineteen months of additional time to be examined by a board certified neuro-specialist physician of their own choosing (*i.e.*, from May 23, 2015, the Effective Date of the Final Settlement with no appeals, through January 7, 2017, the actual Effective Date taking into account the appeals).

In light of the inherent desire to choose one's own doctor and the shortage of board certified neuro-specialist physicians in the United States,<sup>9</sup> the additional nineteen months to locate one,

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<sup>9</sup> For example, as of December 19, 2012, there were "approximately 3689 practicing board certified neurosurgeons for over 5700 hospitals in the U.S., serving a population of more than 311 million people"—or a ratio of 1 board certified neurosurgeon for every 84,305 people in the United States. *See Ensuring an Adequate Neurosurgical Workforce for the 21<sup>st</sup> Century*, at 2 <https://www.cns.org/sites/default/files/legislative/NeurosurgeryIOMGMEPaper121912.pdf> (last visited Feb. 18, 2017). The situation was not predicted to improve—especially since the current

secure an appointment, and have the examination constitutes a Collateral Time Benefit with real value—on many levels—to Class Members who otherwise would not have had time to do so. Absent the Collateral Time Benefit, there would not have been enough time for even a fraction of the 19,000+ Class Members to complete their examinations in the ten month period between July 7, 2014 (the preliminarily approval date) and May 23, 2015 (the Effective Date of the Final Settlement absent the Armstrong Objectors’ appeal to the Third Circuit).

That said, the Armstrong Objectors know of no accurate way to quantify the value of the nineteen month Collateral Time Benefit and concurrent peace of mind to Class Members. They defer to the Court to appropriately consider these benefits when determining their fee award.

#### **THE ARMSTRONG OBJECTORS’ REQUESTED FEE AWARD**

Like Counsel for the NFL and Class Counsel, the Armstrong Objectors’ Counsel are experienced, creative, hardworking lawyers with national practices who are battle tested in class action litigation. Unlike other objectors’ counsel, the Armstrong Objectors’ Counsel ran a lean attorney team, stayed focused, played by the procedural rules, did not make unnecessary filings, and advanced the Armstrong Objectors’ objections in an efficient and effective manner. Their vigorous advocacy “sharpen[ed] the issues and debate on the fairness of the settlement.” *In re*

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population of the United States is now over 324 million people. *Id.* (“As the population ages and more of our citizens face debilitating and life threatening neurological problems such as stroke, degenerative spine disease, and Parkinson’s and other movement disorders, this supply-demand mismatch will become even more acute.”). *See also* the U.S. Population Clock, <https://www.census.gov/popclock/> (last visited Feb. 18, 2017).

Similarly, as of April 2016, there were only 14,268 actively practicing board certified neurologists in the United States—or a ratio of 1 board certified neurologist for every 22,708 people in the United States (*i.e.*, 324 million people divided by 14,268 board certified neurologists) *See* American Board of Psychiatry and Neurology, Inc. Facts and Statistics (APBN Total and Active Certifications), <https://www.abpn.com/wp-content/uploads/2016/08/ABPN-Total-and-Active-Certifications.pdf> (last visited Feb. 18, 2017).



*Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 358 (N.D. Ga. 1993) (awarding objector fees). Their efforts secured additional benefits to Class Members fairly valued up to \$63.65 million.

Armstrong Objectors' Counsel spent 1179.75 hours and advanced over \$70,000 of out-of-pocket expenses working on this matter on behalf of Class Members:

Law Firm	Total Hours	Fees	Expenses	Supporting Declaration Exhibit
The Coffman Law Firm	411.50	\$233,630.00	\$32,031.40	A
Weller, Green, Touns & Terrell	328.00	\$236,600.00	\$38,346.83	B
The Webster Law Firm	262.50	\$77,460.00	-	C
The Warner Law Firm	177.75	\$52,009.80	-	D
<b>Total</b>	<b>1179.75</b>	<b>\$599,699.80</b>	<b>\$70,378.23</b>	<b>-</b>

That said, the Armstrong Objectors seek only an award of their straight time hourly attorneys' fees (\$599,700) with no multiplier and no expense reimbursement.

The Armstrong Objectors' requested fee award is .049% of the overall \$1.227 billion value of the Final Settlement (assuming a Final Settlement value of \$1.163 billion per Class Counsel (e.g., Doc. #7151-1 at 34) plus the \$63.65 million increase secured by the Armstrong Objectors' efforts). The Armstrong Objectors' requested fee award is .942% of the \$63.65 million increase in the value of the Final Settlement, and .533% of the \$112.5 million of attorneys' fees to be paid by the NFL. Should the Court grant the Armstrong Objectors' fee request, Class Counsel will still receive over \$111.9 million in attorneys' fees plus the 5% set-aside (Doc. #6481-1 § 21.1) in a case in which there was no discovery, no contested class certification hearing, no summary judgment practice, and no trial.

The Armstrong Objectors' requested fee award will not diminish Class Members' financial benefits under the Final Settlement, which requires the NFL to pay attorneys' fees and expenses, subject to approval by the Court, over and above payments to Class Members. *Id.* (Doc. #6481-

1) § 21.1. The NFL has agreed not to oppose any fee request exceeding \$112.5 million (*id.* § 21.20), which Class Counsel has requested. Doc. #7151-1. Awarding the full \$112.5 million to Class Counsel without compensating Armstrong Objectors' Counsel for significantly improving the Final Settlement and delivering the Collateral Time Benefit, however, would be inequitable.

### **ARGUMENTS AND AUTHORITIES**

#### **A. The Armstrong Objectors' productive work merits the requested fee award.**

Objectors who confer a material benefit on a class are entitled to a fee award. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 744 (3d Cir. 2001); *see also* 7B CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 1803 n.6 (3d ed. 2004) (collecting cases awarding objector fees). Objectors “serve as a highly useful vehicle for class members, for the court and for the public generally” to bring adversarial scrutiny to proposed class action settlements. *Great Neck Capital Appreciation Inv. Partnership, LP v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 412 (E.D. Wis. 2002). “Therefore, a lawyer for an objector who raises pertinent questions about the terms or effects, *intended or unintended*, of a proposed settlement renders an important service.” *Id.* at 413 (emphasis added).

Objectors play a valuable role given the awkward dynamic inherent in class action settlements; to wit, a defendant is motivated to settle as cheaply as possible and, as a practical matter, does not care whether its settlement payment primarily benefits the class or class counsel so long as it gets a release; class counsel may have an opportunity to maximize fees at the expense of maximum relief to the class; and the court, of course, must scrutinize the proposed settlement acting in its role as a fiduciary to the class. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (“*GM Trucks*”).

This necessarily imposes an extraordinary burden on the court. As Judge Posner explained,

“American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case.” *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (reversing approval of class action settlement based on objectors’ arguments). Thus, vigorous, articulate objections by competent counsel acting for individual class members allow a judge to overcome a “disadvantage in evaluating the fairness of the settlement to the class.” *Id.*

The Armstrong Objectors performed a valuable service to the Court and Class Members in three ways—*first*, by turning this matter into a true adversarial process, *second*, by substantially enhancing the Final Settlement, and *third*, by delivering the Collateral Time Benefit.

**1. The direct benefit derived from the Armstrong Objectors’ challenges to the Revised Settlement and Final Settlement supports the requested fee award.**

“If objectors’ appearance sharpens the issues and debate on the fairness of the settlement, their performance of the role of devil’s advocate warrants a fee award.” *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 358; *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (awarding objector fees for “sharpen[ing] debate” in proceeding). Courts recognize that even where their efforts do not directly increase the size of the settlement fund, “objectors add value to the class-action settlement process” by “transforming the fairness hearing into a truly adversarial proceeding” and “supplying the Court with both precedent and argument to gauge the reasonableness of the settlement.” *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008). Thus, even objections that are “ultimately overruled” may merit a fee award if “the presence of an objector represented by competent counsel transformed the settlement into a truly adversary proceeding.” *Frankenstein v. McCrory Corp.*, 425 F. Supp. 762, 767 (S.D.N.Y. 1977).

Likewise, in *Howes v. Atkins*, 668 F. Supp. 1021 (E.D. Ky. 1987), objectors challenged a

settlement where the parties settled for an amount that was low relative to the optimistic initial views of plaintiffs' counsel. *Id.* at 1027. Objectors "made a vigorous attack on the settlement and pursued extensive discovery," but were unable to find "any reason for the modest settlement except that the evidence had not developed as plaintiffs' counsel had first anticipated." *Id.* The district court, nevertheless, awarded objectors' counsel 10% of the settlement fund, holding that "even though the settlement was not improved," objectors' counsel were entitled to fees for "ably perform[ing] the role of devil's advocate" and "ma[king] the court much more comfortable in approving the settlement." *Id.*

Similarly, here, and as set forth above, the Armstrong Objectors' Counsel's advocacy fleshed out complex issues important to a determination of the fairness of both the Revised Settlement and Final Settlement, as well as delivered the Collateral Time Benefit. The Armstrong Objectors took the lead in addressing the key fairness question in this case: whether the settlement's CTE compromise—providing compensation only to the family members of Class Members who died with CTE by a certain date—was "fair, reasonable, and adequate" under Rule 23(a)(4); (e). The CTE question was highly complex and hotly contested—particularly given the prominence Class Counsel gave CTE in their early pleadings and statements about the case. Approving the settlement without a full airing of the CTE issue would have been a grave injustice.

The Armstrong Objectors Counsel addressed this and other essential issues through (i) their Objection, Amended Objection, and Supplemental Objection, (ii) extensive briefing and argument to the Third Circuit, including organizing appellants' counsels' presentation of the argument, and (iii) extensive briefing to the Supreme Court in support of their petition for writ of *certiorari*. The Armstrong Objectors also significantly contributed to the record—a particularly important service here since the Final Settlement was reached without formal discovery.

**2. The direct benefits of the up to \$63.65 million increase in the value of the Final Settlement and the Collateral Time Benefit support the requested fee award.**

Because “objectors have a valuable and important role to perform in preventing . . . unfavorable settlements, . . . they are entitled to an allowance as compensation for attorneys’ fees and expenses where . . . *the settlement was improved* as a result of their efforts.” *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 743 (quoting *White*, 500 F.2d at 828) (emphasis added) (vacating and remanding order denying objector fee request).

Here, there can be no doubt that the Final Settlement was improved by the Armstrong Objectors’ Counsel’s efforts. Even the Third Circuit recognized the changes made to the Revised Settlement that resulted in the Final Settlement “benefit[ed] class members.” *In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d at 423. Indeed, the changes made to the BAP, Death with CTE benefits, and the appeal fee provisions added up to \$63.65 million of value to the Final Settlement. And that’s not counting the Collateral Time Benefit.

The Armstrong Objectors were the leaders here. Instead of simply identifying the flaws in the Revised Settlement, they offered concrete ways to improve it. In fact, as set forth above, the improvements in the Final Settlement with the greatest value to Class Members had their roots in the Armstrong Objectors’ suggestions.

**3. The requested fee award is reasonable.**

**a. The requested fee award is a reasonable percentage of the benefits conferred.**

When the efforts of counsel result in a large recovery for the class, under common-fund principles, an award of a percentage of the benefit conferred is appropriate. *See McDonough v. Toys “R” Us, Inc.*, 80 F. Supp. 3d 626, 662 (E.D. Pa. 2015). The “percentage-of-recovery method is designed to reward attorneys for” “adding value to the class settlement.” *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 566 (D.N.J. 2003).

The \$599,700 straight time hourly fee award requested sought by the Armstrong Objectors represents .049% of the total \$1.227 billion worth of financial benefits Class Members will receive through the vigorously litigated settlement. And this does not include the Collateral Time Benefit. The requested fee award also is just .942% of the estimated maximum \$63.65 million increase in the value of the Final Settlement.<sup>10</sup> Courts in this Circuit have approved similar awards (as a percentage of the improvement achieved by objectors) in other cases. *See, e.g., Dewey*, 909 F. Supp.2d at 397 (objectors' counsel awarded "13.4% of the benefit conferred," which was "within the range of acceptable percentages-of-recovery."); *Lan v. Ludrof*, No. 1:06-cv-114, 2008 WL 763763, at \*30 (W.D. Pa. 2008) (awarding objector's counsel 25% of the increased settlement value).

**b. The *Gunter/Prudential* factors support the requested fee award.**

The reasonableness of the Armstrong Objectors' requested fee award is further confirmed by analyzing it through the lens of the *Gunter/Prudential* factors: (1) "the size of the fund created and the number of beneficiaries," (2) "the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel," (3) "the skill and efficiency of the attorneys involved," (4) "the complexity and duration of the litigation," (5) "the risk of nonpayment," (6) "the amount of time devoted to the case by plaintiffs' counsel," (7) "the awards in similar cases," (8) "the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations," (9) "the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained," and (10) "any innovative terms of

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<sup>10</sup> This, of course, is only the financial benefit generated by the Armstrong Objectors' efforts. It does not account for the Collateral Time Benefit and the benefit of the adversarial challenge to the overall fairness of the Revised Settlement and Final Settlement.

settlement.” See *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009); *In re Prudential Ins. Co. Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 336 (3d Cir. 1998).

These *Gunter/Prudential* factors are used to evaluate fee requests by both plaintiffs’ counsel and objectors’ counsel. See *McDonough*, 80 F. Supp. 3d at 660. The applicable factors all weigh in favor of the requested fee award.<sup>11</sup>

**i. The size of the fund created by the Armstrong Objectors’ Counsel’s efforts supports the requested fee award.**

The \$63.65 million increase here would be a large recovery in its own right. Indeed, it dwarfs the entire \$35.5 million settlement in *McDonough*. *Id.*, 80 F. Supp.3d at 651. Courts routinely award class counsel large percentages as attorneys’ fees in cases involving settlements in the neighborhood of \$100 million. See, e.g., *In re Ikon Office Sols., Inc.*, 194 F.R.D. at 196-97 (awarding 30% fee in case involving \$111 million settlement). The magnitude of the additional value conferred by the Armstrong Objectors’ efforts—more than an 8.8% increase over the \$760-million valuation of the Revised Settlement—supports the requested fee award. And that does not count the value of the Collateral Time Benefit and enhancing the adversarial process.

**ii. The number of beneficiaries supports the requested fee award.**

The Armstrong Objectors’ efforts benefited all Class Members. Any eligible Class Member may now receive benefits from the unlimited BAP Fund. Any Class Member may qualify for a waiver of the appeal fee if he demonstrates financial hardship. The estates of all Class Members who died between the preliminary approval date and the final approval date benefited from the expanded eligibility period for Death with CTE benefits. And all Class Members desiring to use the board certified neuro-specialist physician of their choosing benefited from the nineteen

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<sup>11</sup> The *Gunter/Prudential* factor pertaining to the number of objections is inapplicable here. Courts have construed this factor to reference only the number of objections to class counsel’s fee petition, which is unknown at this time. See *McDonough*, 80 F. Supp.3d at 660.



month Collateral Time Benefit. The number of Class Members benefiting from the Armstrong Objectors' efforts supports the requested fee award.

**iii. The value of benefits attributable to the Armstrong Objectors' Counsel's efforts relative to the efforts of other objectors supports the requested fee award.**

The Armstrong Objectors were the driving force behind improvements to the Revised Settlement. The Revised Settlement was the best deal Class Counsel were able to extract from the NFL. But as a result of the intense pressure created by the Armstrong Objectors—and this Court's scrupulous efforts to “play[] the important role of protector of the absentees' interests, in a sort of fiduciary capacity” (*GM Trucks*, 55 F.3d at 785)—the Revised Settlement was enhanced to become the Final Settlement.

The Armstrong Objectors were the first to raise the key issues underlying the Final Settlement's improvements—uncapping the BAP Fund, expanding the CTE with Death benefits eligibility period, and eliminating the appeal fee on a showing financial hardship—as well as deliver the Collateral Time Benefit. Other objectors repeated the Armstrong Objectors' arguments or adopted them wholesale. The value of the benefits attributable to the Armstrong Objectors' efforts relative to the efforts of other objectors supports the requested fee award.

**iv. The complexity and duration of the litigation support the requested fee award.**

It is indisputable that this litigation, the Revised Settlement, and the Final Settlement involved complex legal issues—in particular, Rule 23(a)(4) adequacy of representation pertaining to the Death with CTE benefits. *See, e.g.*, the above discussion of the lead role on this issue taken at the Third Circuit by Armstrong Objectors' Counsel, Deepak Gupta. Nor did the Armstrong Objectors give up after the Third Circuit issued its opinion, taking their case to the Supreme Court. The complexity and duration of the litigation—and the Armstrong Objectors'



key role in it—support the requested fee award.

**v. The Armstrong Objectors’ Counsel’s skill, efficiency, and amount of time devoted to the case supports the requested fee award.**

The Armstrong Objectors’ Counsel invested three years and over 1175 billable hours on this litigation working hard to improve—and improving—the Revised Settlement that became the Final Settlement. They litigated the issues with skill and efficiency. Their results speak volumes—additional value up to \$63.65 million was obtained for Class Members. The Armstrong Objectors’ Counsel also delivered the Collateral Time Benefit and enhanced the adversarial process. Their skill, efficiency, and amount of time devoted to the case supports the requested fee award.

**vi. The risk of non-payment supports the requested fee award.**

The Armstrong Objectors’ Counsel’s extensive time investment is particularly significant given that counsel accepted the case on a 100% contingency fee basis, advancing all out-of-pocket expenses on behalf of their clients. The risk of non-payment was high, and, indeed, the Armstrong Objectors’ Counsel do not seek reimbursement of their litigation expenses. Had the Armstrong Objectors been unsuccessful in improving the Revised Settlement, their Counsel might not have received any compensation. *See, e.g., McDonough*, 80 F. Supp.3d at 26. But they were. And they delivered the Collateral Time Benefit, too. The Armstrong Objectors’ Counsel’s risk of non-payment supports the requested fee award.

**vii. Fee awards in similar cases support the requested fee award.**

Although the Court has recognized that fee awards for objectors are infrequent (*McDonough*, 80 F. Supp.3d at 661), courts have awarded attorneys’ fees to objectors’ counsel equal to 13-25% of the increased settlement value they obtained. *See, e.g., Dewey*, 909 F. Supp.2d at 397 (awarding 13.4% of the increased settlement value); *Lan*, 2008 WL 763763, at \*28 (awarding

25% of the increased settlement value). Here, the Armstrong Objectors' straight time hourly rate fee request is only .942% of the \$63.65 million increased settlement value (not including the Collateral Time Benefit) they obtained for Class Members. Fee awards in similar cases, coupled with the Armstrong Objectors hard—and fruitful—work improving the Revised Settlement and testing its fairness, support the requested fee award.

**viii. The percentage fee that would have been negotiated in a private contingent fee arrangement supports the requested fee award.**

The Armstrong Objectors' straight time hourly rate fee request is only .942% of the \$63.65 million increased settlement value (not including the Collateral Time Benefit) they obtained for Class Members. This amount, on a percentage basis, is far less than contingency fees of 30-40% of a total recovery that are "routinely negotiate[d]" in tort cases like this one. *See, e.g., In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-MD-01871, 2012 WL 6923367, at \*8 (E.D. Pa. Oct. 19, 2012) (quoting *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. at 194); *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) ("40% is the customary fee in tort litigation"); *In re Shell Oil Refinery*, 155 F.R.D. 552, 571 (E.D. La. 1993) ("customary contingency fee" in personal injury case "is between 33⅓% and 40%").

The requested fee award, on a percentage basis, also is significantly lower than routine percentage fees in typical contingent fee cases. The requested fee award, on a percentage basis, also is much less than what some counsel representing individual players in this action have negotiated with their clients. For example, counsel for the Estate of Kevin Turner negotiated a contingency fee of up to 45% (Doc. #7029 ¶ 6), which is more than the \$599,700 fee award, on a percentage basis, requested by the Armstrong Objectors. This *Gunter/Prudential* factor supports the requested fee award.

ix. **The innovative terms of the settlement improvements secured by the Armstrong Objectors' Counsel support the requested fee award.**

The improvements to the Revised Settlement secured by the Armstrong Objectors are innovative. They do not focus on adding a fixed amount of money to the settlement, but rather, ensure that all Class Members receive a fair recovery for their injuries. For example, opening up the BAP Fund ensures that all eligible Class Members will receive the benefits of a baseline examination; to wit, securing an early diagnosis of any issues caused by their injuries and establishing a treatment plan that best addresses the issues. Extending the Death with CTE benefits eligibility period and opening up the appeal process will result in even more Class Members (and their families) receiving a fair recovery. And delivering the Collateral Time Benefit will further ensure each Class Member's recovery (and concurrent peace of mind) by allowing him to use a board certified neuro-specialist physician of his choice, rather than one assigned by the NFL and Class Counsel.

The Armstrong Objectors' suggested innovative improvements incorporated into the Final Settlement, as well as the Collateral Time Benefit, support the requested fee award.

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Where the *Gunter/Prudential* factors weigh heavily in favor of a fee award—as they do here—courts in this circuit regularly award attorneys' fees equal to 15-33% of the amount of the total class benefit. See, e.g., *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) (collecting cases); *In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at \*14 (E.D. Pa. June 2, 2004) (noting Federal Judicial Center study finding median fee award to be 27-30% and approving 30% fee award after applying *Gunter* factors).

An award of the Armstrong Objectors' Counsel's straight time hourly fees, which, on a percentage basis, are approximately .942% of the up to \$63.65 million of additional benefits

conferred on Class Members (excluding the Collateral Time Benefit) are *below* the lower end of the acceptable fee range. Given the magnitude of the additional Class Member benefits secured by the Armstrong Objectors, their Counsel's requested fee award is more than reasonable.

**B. The requested fee award should be paid from the Attorneys' Fees Qualified Settlement Fund.**

The Armstrong Objectors' requested fee award should be paid from the \$112.5 million the NFL is required to contribute to the Attorneys' Fees Qualified Settlement Fund, or, alternatively, paid by the NFL and/or Class Counsel. It is well within this Court's discretion to require objectors' fees to be paid from Class Counsel's award or by the defendant to "avoid dilution of the settlement fund." See *In re Ikon Office Sols., Inc., Secs. Litig.*, 194 F.R.D. at 197; *Great Neck Capital Appreciation Inv. P'ship, L.P.*, 212 F.R.D. at 417.

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**WHEREFORE**, the Armstrong Objectors respectfully request the Court to award them (i) attorneys' fees of \$599,700, and (ii) such other and further relief to which they are justly entitled.

Date: March 1, 2017

Respectfully submitted,

/s/ Richard L. Coffman

Richard L. Coffman

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**COUNSEL FOR THE ARMSTRONG  
OBJECTORS**

**CERTIFICATE OF SERVICE**

I certify that a true copy of the Armstrong Objectors' Memorandum of Law in Support of their Petition for an Award of Attorneys' Fees was served on all counsel of record, via the Court's ECF system, on March 1, 2017.

/s/ Richard L. Coffman  
Richard L. Coffman

**COUNSEL FOR THE ARMSTRONG  
OBJECTORS**

# Exhibit C

**Revised Summary of Expenses**

	<b>MoloLamken LLP</b>
<b>Reporting Period:</b>	<b>September 3, 2013 - November 30, 2016</b>

<b>Type of Expense</b>	<b>Total Expenses</b>
(1) Fees	\$830.36
(2) Federal Express/Local Courier, etc.	\$0.00
(3) Postage Charges	\$0.00
(4) Fascimile Charges	\$0.00
(5) Long Distance/Conference Calls	\$0.00
(6) In-House Document Reproduction	\$0.00
(7) Outside Document Reproduction	\$8,336.86
(8) Lodging/Hotels	\$6,649.81
(9) Dining/Meals	\$271.11
(10) Mileage	\$121.00
(11) Air Travel	\$2,868.90
(12) Ground Transportation	\$6,237.74
(13) Legal Research/Lexis/Westlaw	\$0.00
(14) Miscellaneous (litigation support, graphics, articles/books, supplies for hearing)	\$21,025.74
<b>Total:</b>	<b>\$46,341.52</b>

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

No. 12-md-2323 (AB)

MDL No. 2323

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THIS DOCUMENT RELATES TO:

Plaintiff's Master Administrative Long-Form  
Complaint and:

Document 7151

**JOINDER TO OBJECTIONS TO CO-  
LEAD COUNSEL'S PETITION FOR  
AN AWARD OF ATTORNEYS' FEES,  
REIMBURSEMENT OF COSTS AND  
EXPENSES, ADOPTION OF SET  
ASIDE OF EACH MONETARY  
AWARD AND OTHER RELIEF**

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Comes now Attorney David Buckley, PLLC, and files this joinder to all objections to Co-Lead Counsel's Petition For An Award Of Attorneys' Fees, Reimbursement Of Costs And Expenses, Adoption Of Set Aside Of Each Monetary Award And Other Relief on behalf of Sydney Justin, and all other Retired NFL Players and members of the Class Certified in this matter represented by Attorney David Buckley, PLLC and state as follows:

1. On February 13, 2017, Co-Lead Class Counsel filed its Petition For An Award Of Attorneys' Fees, Reimbursement Of Costs And Expenses, Adoption Of Set Aside Of Each Monetary Award And Other Relief.
2. The Court Ordered Objections to Co-Lead Class Counsel's Petition referenced hereinabove to be filed on or before March 27, 2017.



3. Sydney Justin, and all other Retired NFL Players and members of the Class Certified in this matter represented by Attorney David Buckley, PLLC hereby file this Notice of Joinder to Objections and do hereby join the objections filed in documents 7344, 7346, 7350, 7353, 7356, 7359, and any objections filed hereafter.
4. In summary, the individuals represented by Attorney David Buckley, PLLC oppose and object to any fee award to be taken out of individual awards, including the 5% holdback requested by Class Counsel. Objectors remain fully supportive of the settlement and have no objection to Class Counsel receiving an award of attorneys' fees and expenses to be paid by the NFL parties.

Dated: March 27, 2017

Respectfully submitted,

ATTORNEY DAVID BUCKLEY, PLLC



By: \_\_\_\_\_

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State Bar No. 24078281  
FED ID No. 1465981  
Scott Wert  
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[scott@thebuckleylawgroup.com](mailto:scott@thebuckleylawgroup.com)

**ATTORNEY FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing Petition to Establish Attorney's Lien to be served via the Electronic Case Filing (ECF) system in the United States District Court for the Eastern District of Pennsylvania, on all parties registered for CM/ECF in the litigation.

Dated: March 27, 2017



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Scott Wert  
Attorney David Buckley, PLLC  
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**ATTORNEY FOR PLAINTIFFS**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

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IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIG.,	) ) ) )	2:12-md-02323-AB
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**CURTIS L. ANDERSON'S SECOND SUPPLEMENTAL OBJECTION  
TO CLASS COUNSEL'S FEE PETITION**

In the interest of brevity, class member Curtis L. Anderson (“Anderson”) hereby supplements his original (DE 6248) and subsequent (DE 7237) objections to the settlement’s fee provision with the following points germane to class counsels’ actual fee petition (DE 7151):

1. Class Counsel's projected \$950 million in future monetary awards is based on unrealistic assumptions not borne out by actual class member behavior and experience. Since most NFL players believed they would qualify for compensatory damages related to CTE, the vast majority who filed suit are now left without any recovery. Based on Class Counsel's own optimistic assumptions, the maximum potential payout will fall to \$425 million if 50% of the class registers by August 2017 (only 30% are currently registered). “[A]warding attorneys’ fees based on the entire settlement amount rather than individual distributions creates a potential conflict of interest between absent class members and their counsel.” *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013). Therefore, this Court’s analysis of Plaintiffs’ fee petition should follow that recommended for ‘claims made’—not ‘constructive fund’—settlements. Specifically, the Court should wait until at least August 7, 2017 before awarding any fees. Only when total

registrations are tallied will the Court be able to determine whether the settlement has proved attractive enough to justify Class Counsel's fee request.

2. Even if the percentage-of-fund approach can be justified, the award should be based on the potential benefits actually obtained through Class Counsel's efforts—not by this Court's prodding and/or the Special Master's leadership. At the conclusion of the first round of settlement negotiations, Class Counsel agreed to release all class claims for a total potential monetary recovery of \$675 million dollars. In response to this Court's genuine concerns about the settlement's sufficiency, the parties proceeded to iron out enhancements under the Special Master's supervision. Now, Class Counsel seeks to benefit from these enhancements in applying the percentage approach to their fee request. Such a position violates the overriding principle that Plaintiffs' fee award must reasonably relate to the actual benefits achieved by Class Counsel.

3. For several reasons, a lodestar crosscheck will also confirm the fee request is unreasonable. First, the average hourly rate of \$784 suggests that most of the work was accomplished by expensive partners instead of economical associates. Second, a large portion of their time was devoted to supplemental negotiations prompted by this Court due to Class Counsel's failure to secure adequate protection for the class in the first instance. Third, any multiplier over Class Counsel's lodestar requires a concrete showing that exceptional benefits were obtained for the class (as opposed to minimum standards of reasonableness within the Court's discretion). See *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 851–52 (5th Cir. 1998). Plaintiffs' inability to secure liability for CTE claimants—the original impetus for seeking class protection—was the litigation's major disappointment.

4. A more reasonable *average* hourly rate for this case would be \$600, which would result in a lodestar of approximately \$30 million. This means the requested fee of \$107

million represents a multiplier of 3.56, not 2.56—clearly excessive for this case. At the time the fee was negotiated, the \$112.5 million award represented a multiplier of at least 7 (since the lodestar back then was just \$15 million). Moreover, all risk of non-payment ceased when the first settlement was announced in August 2013. Thus, any multiplier should be limited to work done before the initial settlement was announced.

5. The Court should void all individual fee contracts where the attorney representing a class member is also receiving a portion of the common benefit attorney's fees. This form of double-dipping—where the same attorney receives up to 40% of an individual award—is inherently unreasonable given the high class hourly rates already requested and the possibility of a multiplier to the attorney's lodestar.

6. For several reasons, Class Counsel's request to set aside 5% of each monetary award up front should be denied. First, the request is premature because the true administrative costs are not yet known. Second, it contradicts the justification for their \$112.5 million fee request. Third, it violates the Settlement's requirement to describe "the proposed amount" and "how the money will be used". No dollar amount is requested and little justification or disclosure of the projected facilitation costs is given. Specifically, they offer no projections of the costs, no expert reports, nothing empirical whatsoever to support the imposition of what amounts to a \$50 million tax. Fourth, Class Counsel's attempt to collect all of the money purportedly necessary to fund the common benefit costs for the Settlement's 65-year life expectancy places their own pecuniary self-interest over the class' need for adequate recovery. Fifth, the most disabled and needy Class Members who seek a recovery early in the claims process will be penalized by front-loading the maximum set-aside. Sixth, allowing the maximum levy now will create a slush fund that will encourage bloated billing without adequate controls. Finally, the set aside will interfere with class members' right to retain independent legal counsel of their choice at the appropriate time.

Far better to approve a lower set aside up front, then permit counsel to petition to recover shortfalls down the road once actual claims are paid.

7. MoloLamken's request for a \$20 million fee award—based on speculative projections of maximum possible benefits—should be denied as premature. While they value their contribution in extending the CTE deadline at \$44.8 million, MoloLamken assumes 96% of the 111 players who died between the original deadline and the amended one will file a claim. They also assume everyone will establish a Qualifying Diagnosis. The obvious problem with these assumptions is that any quantification of the benefits produced by the enhancement must await the actual filing, evaluation, and payment of claims. Neither can MoloLamken take sole credit for this enhancement. Most of the other objector/appellants were equally focused on this defect, and will presumably apply for fees at the appropriate time.

Date: March 27, 2017

Respectfully submitted,  
Curtis L. Anderson,  
By his attorney,

/s/ George W. Cochran  
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Streetsboro, Ohio 44241  
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Fax: (330) 230-6136  
Email: [lawchrist@gmail.com](mailto:lawchrist@gmail.com)

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was filed via the ECF filing system on March 27, 2017, and that as a result electronic notice of the filing was served upon all attorneys of record.

/s/ George W. Cochran  
George W. Cochran

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION,**

**Plaintiffs,**

**vs.**

**NATIONAL FOOTBALL LEAGUE;  
et. al.,**

**Defendants.**

**No. 2:12-md-02323-AB MDL No. 2323**

**Hon. Anita B. Brody**

**Civil Action NO. 14-00029-AB**

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**THIS DOCUMENT RELATES TO:  
ALL ACTIONS and DK#7151**

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**OBJECTIONS TO CO-LEAD CLASS COUNSEL'S  
REQUEST FOR 5% SET ASIDE**

**I. INTRODUCTION**

This Memorandum is filed by retired National Football League players and class members MICHAEL MERRIWEATHER, BRIAN WILLIAMS, GEORGE KOONCE, JOHN HARRIS, VIDAL CARLIN, DERRICK MAYES, COURTNEY GRIFFIN, BOBBY ABRAMS, BOBBY WATKINS, HONOR JACKSON, CHARLIE SMITH, KEVIN SMITH, GUS PARHAM, JEFF STOVER, JUDE WADDY, DUVAL LOVE, TRAVIS JERVEY, LOUIS LEONARD, KARL MORGAN, SIRAN STACY and J. DOUGLASS HOLLIE ("Objectors").



In their petition for attorneys' fees, Co-Lead Class Counsel ("CCC") seeks an award of \$112.5 million for attorneys' fees and costs to date, plus an additional 5% set aside. CCC argues that the 5% set aside is necessary to compensate CCC for future work in monitoring the settlement. Objectors do not challenge CCC's request for \$112.5 in fees and costs. Instead, Objector's contend that awarding the 5% set aside is not appropriate at this time for two reasons.

First, CCC has not fully disclosed their ongoing interests in recovery from class members through individual retainer agreements. CCC has secured individual retainers from class members entitling them to a portion of class members' individual awards. Full knowledge of the number of class members who have signed individual contingent fee agreements with CCC, the terms of those agreements and the anticipated recovery of class awards by CCC through contingent fee agreements is crucial to assessing the propriety of future fees. Second, assuming a set aside is appropriate for future fees and costs, CCC have shown no correlation between projected monitoring duties and the amount of the set aside.

## **II. CLASS COUNSEL'S REQUEST FOR A SET ASIDE IS PREMATURE**

### **A. Full Disclosure of Class Counsel's Potential Fee Recovery From Class Members Is Needed Before The Court Can Determine Whether A Set Aside Is Necessary**

In a brief passage, CCC notes in their Petition that they have individual fee agreements with class members and, with the exception of Seeger Weiss LLP, all CCC will seek recovery of fees pursuant to the presumably contingent fee agreements:

This petition does not include attorney time or expenses specific to their individual clients' cases. Fn. 8 Co-Lead Class Counsel's firm, Seeger Weiss LLP, had been individually retained by a number of Class Members. Seeger Weiss has waived attorneys' fees and expenses from Class Members whom the firm represents on an individual basis, and will seek compensation solely from common benefit funds given that its work and expenditures have overwhelmingly focuses on common benefit efforts... *Other firms, however, are asserting their rights to be compensated pursuant to their retainers for work done on behalf of their individual clients.* (Emphasis added.)

CCC's Fee Petition, ECF 7151-1 at p. 15.

Thus, CCC seeks recovery of fees in three ways. First, they request an award of \$112.5 million for work through the effective date of the Settlement. Additionally, CCC request a 5% set aside, a projected \$47.5 million, for efforts contributing to the common benefit of the class post-settlement. On top of that, CCC acknowledges they have individual retainer agreements with class members for an unspecified portion of class members' awards.<sup>1</sup>

CCC anticipates \$950,000,000 in class awards. If CCC has individual agreements with just half of the class members and the contingent fee agreements are in the 33% range, CCC may recover an additional \$156,750,000 in fees. Combined with the \$112.5 million in initial fees and \$47,500,000 in set aside, CCC's fee recovery could total \$275 million or more.

On an individual basis, a class member who secures a \$1 million award would pay 5% or \$50,000 to CCC and, assuming he is represented by CCC, possibly another \$333,000 to CCC. In the end, CCC could recover nearly 40% of individual class member's monetary award in addition to the \$112.5 million it now seeks.

Absent a full disclosure of the number of individual class members represented by CCC and terms of the contingent fee agreements, it is impossible for the Court to assess the reasonableness of a 5% set aside.

**B. Assuming A Set Aside Is Warranted, There Is No Correlation Between  
The Post Settlement Activities Listed By Class Counsel And The  
Requested Set Aside**

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<sup>1</sup>Co-Lead Class Counsel Seeger Weiss states that it will not seek recovery of individual fees from class members under its agreements. However, those class members may eventually be represented by other class counsel.

CCC sets forth a series of activities they must undertake in overseeing the settlement, including:

- finalization and dissemination of Supplemental Class Notice regarding the registration and benefits timetable;
- finalizing and overseeing the effectuation of registration forms;
- overseeing the transition of call center operations to the Claims Administrator;
- continuing revisions to the Settlement website;
- review of applications of MAF Physicians and vetting candidates for retention;
- finalizing claim forms and processes, and finalizing appeals forms and processes;
- consulting with experts to stay abreast of medical developments;
- working with the administrative appeals process;
- providing assistance for all claimants who have not retained lawyers;
- in some instances assisting counsel representing individual Plaintiffs;
- establishing, reviewing, and conducting ongoing auditing and financial reporting on the BAP and MAF programs; and
- monitoring and ensuring the NFL Parties' compliance with the funding and the maintenance of the targeted reserves for the MAF and BAP, as well as to monitoring the Settlement Trust and Trustee under Article 23 of the Settlement.

CCC believes the 5% set aside “provides a source to facilitate fair and reasonable compensation for these and other necessary services of Plaintiffs’ Counsel for the benefit of the Class over the coming years.” *See*, Fee Petition, ECF 7151-1 at p. 63-64. However, CCC makes no projection on the cost of such services. Instead, they state “Plaintiffs’ Counsel cannot fully or accurately predict the scope or extent of those necessary services.” *Id.*

Given CCC's extensive experience in comparable class litigation, they can provide a reasonably accurate cost range. For example, having managed similar settlements, they could explain whether they expect monitoring fees to be in the \$3-\$5 million range or maybe \$5-\$10 million. A range of fees and costs would provide guidance on a reasonable set aside. Whatever the projection, it is unlikely that monitoring the settlement will cost the \$47.5 million CCC seeks.

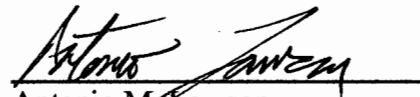
As noted in the Fee Petition, Plaintiffs' counsel incurred 51,000 billable hours for the dozens of lawyers and paralegals that litigated this case through settlement. *See*, Fee Petition, ECF 7151-1 at p. 52. Monitoring the settlement would take relatively few lawyers and significantly less legal work. Although the settlement period is prolonged, 65 years, the vast majority of the work is frontloaded and the parties have done an excellent job delegating duties to the Claims Administrator, Special Master and administrative support staff. Before a set aside is considered, CCC should provide a reasonable calculation of projected fees and costs through the conclusion of the settlement.

### III. CONCLUSION

Objectors' believe CCC's request for a 5% set aside is not appropriate at this time because too many questions remain unanswered. CCC should discuss the number and nature of its individual fee agreements with class members regarding class members' fees; and provide a detailed estimate of fees and costs to be incurred in monitoring the settlement.

Date: March 27, 2017

Respectfully submitted,  
**LAWSON LAW OFFICES**



Antonio M. Lawson  
CA State Bar No. 140823  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was served via overnight mail on March 27, 2017 to the Court for filing and service through the ECF filing system, and that as a result electronic notice of the filing was served upon all attorneys of record.

  
Antonio M. Lawson

Clerk of the District Court/NFL Concussion Settlement  
Judge Anita B. Brody (1 copy)  
Eric Sobieski, MDL Docketing (1 copy)  
US District Court, Eastern District of Pennsylvania  
2609 US Courthouse  
601 Market Street  
Philadelphia, PA 19106-1797

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Kevin Turner and Shawn Wooden, *on  
behalf of themselves and others  
similarly situated,*

Plaintiffs,

vs.

National Football League and NFL  
Properties LLC, successor-in-interest  
to NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
DK#7151

No. 2:12-md-02323-AB MDL No. 2323

Hon. Anita B. Brody

Civ. Action No. 14-00029-AB

**NOTICE OF JOINDER IN VARIOUS OBJECTIONS OF  
CO-LEAD CLASS COUNSEL'S PETITION FOR AN  
AWARD OF ATTORNEYS' FEES, REIMBURSEMENT  
OF COSTS AND EXPENSES, ADOPTION OF A SET-  
ASIDE OF EACH MONETARY AWARD AND OTHER  
RELIEF**

This Memorandum is filed on behalf of LORENZO WHITE, and 94 others who are Retired NFL Players and members of the Class certified in this matter, all of which object to Co-Lead Class Counsel's (the "CCC") Petition for An Award of Attorneys' Fees, Reimbursement of Costs and Expenses, Adoption of a Set-Aside of Each Monetary Award and other relief, filed on February 13, 2017 ("The Petition").

In the interest of judicial economy, and due to the fact that the

aforementioned class members and undersigned counsel both object for the same reasons listed in their motions, Weisberg & Associates, PA, hereby joins, adopts, and incorporates by reference in its entirety, the following objection(s) to “The Petition”: Documents 7356, 7355, 7354, 7353, 7351, 7350, 7346, 7344, and 7282.

Respectfully submitted,

**WEISBERG & ASSOCIATES,  
Attorneys at Law**

s/ Lawrence Weisberg  
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m Attorney for Individual Class  
Members

**CERTIFICATE OF SERVICE**

\*\*I CERTIFY that the above has been filed with the Clerk of Court’s EF/ECM system, which will provide service to all parties designated to receive service this March 27, 2017.

s/ Lawrence Weisberg  
Lawrence Weisberg, Esq.

\*\* Due to an issue with electronic filing on 3/27, this Notice could not be filed until 3/28. However, it was sent to co-lead counsel via email on 3/27 to meet the deadline.



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and others  
similarly situated,*

Plaintiffs,

National Football League and  
NFL Properties LLC,  
successor-in-interest to NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

Case No. 12-md-2323 (AB)

MDL No. 2323

Hon. Anita B. Brody

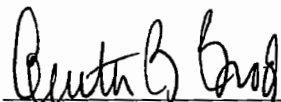
**PROPOSED ORDER**

AND NOW, upon consideration of DeAndra' Cobb's *et al.* Motion to Accept Objection to Five Percent Set-Aside Filed on March 27, 2017 Under the Wrong Case Number [ECF No. 7401], and any responses thereto, it is hereby

ORDERED that the motion is GRANTED.

1. Counsel shall refile the objection, which shall be deemed filed as of March 27, 2017.

SO ORDERED, this 29<sup>th</sup> day of March, 2017



Anita B. Brody  
United States District Judge

Copies via ECF on — JA7277



**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Case No. 12-md-2323 (AB)

MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and others  
similarly situated,*

**Hon. Anita B. Brody**

Plaintiffs,

National Football League and  
NFL Properties LLC,  
successor-in-interest to NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**OBJECTION TO FIVE PERCENT SET-ASIDE FROM ALL AWARDS  
REQUESTED IN CO-LEAD COUNSELS' PETITION FOR AN AWARD OF  
ATTORNEY'S FEES, AND INCORPORATED MEMORANDUM OF LAW**

In accordance with this Court's Order dated March 8, 2017 [MDL ECF No. 7261] setting deadlines to file objections or responses to Co-Lead Counsels' Petition for Attorney's Fees [MDL ECF No. 7151] (the "Petition"), and Order dated March 8, 2017 [MDL ECF No. 7403] granting the motion for extension of time to file, Class Members and Retired Players DeAndra' Cobb, Robert Brannon, Tim McTyler, Eric Starr, Randy Phillips, Eric Green, Reggie Freeman, Siupeli Malamala, Holbert Johnson, Scot Kirby, Eric Streater, Woodrow Lowe, Javarris James, DaJuan Morgan, Dedrick Epps, Steven Harris, Davlin Mullen, Michael Merritt, Cornel Webster, Ron Edwards, Claude Wroten, Johnnie Lynn, David Sims, Gary Mullen, Kim Anderson, Brandon Banks-McNair,

Shawn Banks, Fred Bennet, Luther Broughton, Marquice Cole, Walter Curry, Joshua Bell, Emanuel Cook, Corvey Irvin, Anthony Allen, Michael Coe, Derico Murray, Ed Phillon, Stefan Logan, Britt Davis, Kynan Forney, Deveron Harper, Robert Hicks, Dale Jones, Frank Leatherwood, Durwood Roquemore, Derek Walker, Markus White, Jenorris James, Drew Coleman, Titus Dixon, Greg Evans, Jim Lavin, Davidia Mims, Tony Nathan, Evan Oglesby, Brandon Sanders, Maurice Smith and Reggie Smith (collectively the “Cobb Class Members”) object to the Set-Aside of Five Percent of all Monetary Awards requested in the Petition.

In support of their objections, the Cobb Class Members file the following incorporated Memorandum of Law.

### **MEMORANDUM OF LAW**

#### **I. SUMMARY OF COBB CLASS MEMBERS’ OBJECTION**

On February 13, 2017, Co-Lead Counsel filed the Petition (MDL ECF No. 7151-1, p. 45<sup>1</sup>) requesting an award of attorney’s fees, and other relief, under Rule 23(h) of the Federal Rules of Civil Procedure and Section 21.1 of the Settlement Agreement (MDL ECF No. 6481-1). In addition to permitting a petition for attorney’s fees, the Settlement Agreement provides that “[a]fter the Effective Date, Co-Lead Counsel may petition the Court to set aside up to five percent (5%) of each Monetary Award and Derivative Claimant Award to facilitate the Settlement program and related efforts of Class Counsel.” *See* MDL ECF No. 7151, p. 78.

Although the Settlement Agreement allows Plaintiffs’ Counsel to make the request, numerous factors weigh heavily against granting the Set-Aside at this time. Specifically, award of the Five Percent Set-Aside: (a) is arbitrary to the extent five percent bears no relationship to an analysis of potential actual costs to administer or oversee this matter; (b) is not supported by the

controlling case law and would amount to an excessive fee for Plaintiffs' Counsel; (c) lacks written, definitive protocol that would allow this Court to analyze its merit and impact on the Class and is not warranted, required or likely to provide any benefit. Under the circumstances, the Cobb Class Members object to Co-Lead Counsel's Petition for the Set-Aside of Five Percent of all Awards.

## **II. LEGAL STANDARD**

"In determining how much to award in a common fund case, the Court of Appeals for the Third Circuit has historically instructed courts to consider the factors set forth in *Gunter u. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir.2000), which include: (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases." *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.* ("Avandia") MDL No. 1871, 2012 WL 6923367, at \*2 (E.D. Pa. Oct. 19, 2012).

## **III. ARGUMENT**

### **A. The Proposed Five Percent Set-Aside is Arbitrary.**

In the Petition, Co-Lead Class Counsel asserts that "Plaintiffs' Counsel secured a benefit of nearly \$1.2 Billion for the Class" comprised of: (a) the Monetary Award Fund - \$950,000,000; (b) Baseline Assessment Program ("BAP") - \$75,00,000; (c) Education Fund - \$10,000,000; (d) Notice Costs - \$4,000,000; (e) Claims Administration - \$11,925,000; and (f) Attorney's Fee Provision - \$112,500,000 (total of \$1,163,425,000). *See* MDL ECF No. 7151-1, p. 45. Not surprisingly, Class Counsel requests an award of the entire dedicated Attorney's Fee Provision of \$112,500,000.

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<sup>1</sup> Page numbers refer to the ECF stamped page numbers unless otherwise indicated.

In addition, Class Counsel requests that the Court award the Five Percent Set-Aside. Section 21.1 of the Settlement Agreement provides as follows:

After the Effective Date, Co-Lead Counsel may petition the Court to set aside up to five percent (5%) of each Monetary Award and Derivative Claimant Award to facilitate the Settlement program and related efforts of Class Counsel. These set-aside monies shall be held in a separate fund overseen by the Court. Any future petition for a set-aside will describe: (i) the proposed amount; (ii) how the money will be used; and (ii) any other relevant information (for example, the assurance that any “set-aside” from a Monetary Award or Derivative Claimant Award or Derivative Claimant Award for a Settlement Class Member represented by his/her individual counsel will reduce the attorney’s fee payable to that counsel by the amount of the “set-aside”). No money will be held back or set aside from any Monetary Award or Derivative Claimant Award without Court Approval.

*See* MDL ECF No. 7151-1, p. 70-1.

Keeping in mind that the “uncapped” Monetary Award Fund - \$950,000,000 is not actually funded, the Five Percent Set-Aside ostensibly amounts to an additional \$47,500,000 in attorney’s fees to Class Counsel. Aside from asserting a good deal more work is necessary, and the comparison to “similar” cases, Co-Lead Counsel fails to provide any analysis to support a set aside of that magnitude. There is no pro forma analysis estimating the cost of potential future work. In addition, the controlling cases cited by Co-Lead Counsel do not support the Five Percent Set-Aside and are differentiated by the source and structure of fee awards in relation to the set asides.

**B. The Proposed Five Percent Set-Aside is Not Supported by Controlling Case Law and Results in an Excessive Fee.**

**Avandia**

Co-Lead Counsel cites to an Eastern District of Pennsylvania MDL, *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.* (“Avandia”) in support of the Set-Aside. *See* MDL ECF No. 7151-1, p. 71. The *Avandia* MDL was formed on October 16, 2007 and ended February 14, 2012 when the Plaintiffs’ Steering Committee was not renewed. *See* MDL No. 1871, 2012 WL 6923367,

at \*1 (E.D. Pa. Oct. 19, 2012). On August 26, 2009, the *Avandia* Court entered Pretrial Order (“PTO”) No. 70, which provided that seven percent (7%) of individual settlements be paid to a common benefit fund to be used for payment of court-approved common benefit attorneys’ fees. *See* MDL No. 1871, 2012 WL 6923367, at \*1 (E.D. Pa. Oct. 19, 2012); Exhibit A, PTO No. 70.

When the steering committee was not renewed, *Avandia* lead class counsel moved for an award of common benefit attorneys’ fees, requesting 6.25% of the estimated gross settlement amounts to be paid out of the common benefit fund created by PTO No. 70. *See* MDL No. 1871, 2012 WL at \*1. The Court performed a detailed analysis of similar cases, held that the fee award of 6.25% was reasonable and awarded the fee petition. *Id.* at \*6-7, 11.

Recognizing that lead class counsel might incur additional attorney’s fees and expenses, the Court awarded an additional \$10,050,000 to be held in reserve for payment of future administrative fees and expenses. *Id.* at \*11. In making the reserve determination, the Court considered evidence indicating that the value of the collective settlements in the case was approximately \$2.3 billion.<sup>2</sup> Comparing the amount of the *Avandia* paid settlement funds (\$2.3 billion) to the amount of the set aside of (\$10,050,000) this Court allowed for a reserve of approximately four tenths of a percent, .437% (less than one half of one percent) of the settlement monies ( $\$10,050,000 / \$2.3 \text{ billion}$ ) to be set-aside for additional fees. The reserve paid both the future set aside and all of the common fund attorney’s fees. Moreover, the future set aside was approximately seven percent (7%) of the total fees and costs awarded to plaintiffs’ counsel ( $\$10,050,000 / \$143,750,000$ ).

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<sup>2</sup> The Court never expresses the total value in its holding. However, it does estimate the 6.25% award at \$143,750,000. Using these amounts as a basis, the total estimated value of the settlement was \$2.3 billion ( $\$143,750,000 / .0625 = \$2.3 \text{ billion}$ ).

**Diet Drugs**

In another Eastern District of Pennsylvania MDL, *In re Diet Drugs, Sales Practices & Prods. Liab. Litig.* (“*Diet Drugs*”), the Court ordered percentages of the settlement funds to be set-aside to create funds to compensate plaintiffs’ counsel as well as post-award fees and expenditures. MDL 1203, 553 F.Supp.2d 442 (E.D. Pa. Apr. 8, 2008). The Court initially allowed for assessments out of the individual settlement amounts between six percent (6%) and nine percent (9%), which were later lowered to six percent (6%) and four (4%) in 2002. The assessments of settlement awards were withheld and placed into various accounts in anticipation of a final fee award to class counsel. *Id.* at 456-59.

In 2002, this Court approved an interim award of attorneys’ fees and costs to be paid out of the assessments of approximately \$171 million, *Id.* at 459, which was later reduced to approximately \$159 million. *In re Diet Drugs*, MDL 1203, 2003 WL 2161958, at \*15-16 (E.D. Pa. May 15, 2003). Five years later, the parties renewed their petition for a final award of attorneys’ fees and costs, and the Court awarded plaintiffs’ counsel a total of approximately \$567 million.<sup>3</sup> *Diet Drugs*, 553 F.Supp. 2d at 498-500.

In making this award, the Court was presented with evidence that the value of the collective settlements in the case was approximately \$6.4 billion. *Id.* at 472. In addition, the Court allowed for a reserve fund of approximately \$20 million to compensate the class counsel for future attorneys’ fees and costs (the Court also declined class counsel’s request that an additional \$4 million be added to the reserve fund from amounts held from the assessments). *Id.* at 487-88.

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<sup>3</sup> This amount includes the initial \$159 million from the interim award, approximately \$357 million awarded out of Fund A and Fund B, and \$56 million awarded out of a MDL fee and cost account.

At the end of the litigation, this Court allowed for a reserve of slightly less than one third of one percent (.3125%) of the total settlement payments (\$20 million / \$6.4billion) to be set-aside for additional fees. Looked at another way, the Court allowed for reserve funds of approximately 3.1% of the total fees and costs awarded to plaintiffs' counsel (\$20 million / \$567 million).

### **NFL Concussion**

The payment structure of the instant case is strikingly different from that of *Avandia* and *Diet Drugs*. In *Avandia* and *Diet*, the reserve funded common benefit attorney's fees for class counsel as well as the designated set-asides for attorney's fees. The percentages used for assessments in those cases (7% in *Avandia* and 6% – 9% in *Diet Drugs*) cited by Co-Lead Class Counsel funded all attorney's fees, not just the reserves. Accordingly, Co-Lead Class Counsel's assertion that the Five Percent Set-Aside is on par with *Avandia* and *Diet Drugs* must fail because the NFL Parties are paying \$112.5 million directly to compensate attorneys for common benefit work performed in the MDL to date. *See* MDL ECF No. 7151-1, p. 15.

Instead of seeking a five percent set-aside to compensate Class Counsel for their common benefit work on the MDL as a whole (which is approximately Class Counsels' fee before the multiplier), the Set-Aside is merely for future work. It is worth noting that both *Avandia* and *Diet Drugs* required significant administration post-settlement<sup>4</sup> and yet the set-asides for future attorney's fees amounted to less than one half of a percent of the total value of the settlement.

The Set-Aside amount of approximately \$47.5 million is simply over the top. Adding the Set-Aside to the \$112.5 million spikes the percentage of recovery ratio from almost 12% to almost

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<sup>4</sup> For instance, the settlement agreement in *Diet Drugs* involved extensive medical diagnostic services to class claimants (of which there were hundreds of thousands) as well as an ongoing medical research program. 553 F.Supp.2d at 451-52.

17%. In addition, the Set-Aside represents approximately 42% of the final award of attorneys' fees and costs to Class Counsel compared to 7% in *Avandia* and 3.5% in *Diet Drugs*.<sup>5</sup> Because the requested reserve is wildly disproportionate to those allowed in the past, it should be rejected by this Court.

**C. The Proposed Five Percent Set-Aside lacks any Written Protocols, Procedures or Safeguards that would allow the Court to Conduct a Meaningful Analysis and is not Warranted, Required or likely to Provide any Benefit at this Time.**

Co-Lead Counsel requests that the Court set aside approximately \$47.5 million without providing any of the requisite protocols to oversee and administer the funds. The Court has no guidance regarding the benefit to the class and there is no need to provide a fund to set aside an additional \$40 million dollars on top of the \$112 million.

**IV. CONCLUSION**

The Set-Aside provides nothing in the way of benefit to the class at this time, would result in an excessive fee unsupported by the law.

Dated: March 29, 2017

Respectfully Submitted,

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<sup>5</sup> Moreover, the Defendant in this case agreed to pay an estimated \$11,925,000 in claims administration fees and \$4,000,000 in Notice Costs, a factor not present in *Diet Drugs* or *Avandia*. (MDL ECF No. 7151-1, p. 44 of 82)



**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2017, the foregoing document was electronically filed with the United States District Court for the Eastern District of Pennsylvania via the Court's CM/ECF system, and that the filing is available for downloading and viewing from the electronic court filing system by counsel for all parties.

**LOREN & KEAN LAW**

*s/ Michael St. Jacques*

\_\_\_\_\_  
**MICHAEL G. ST. JACQUES, II**

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
Kevin Turner and Shawn Wooden, <i>on behalf of themselves and others similarly situated</i> ,  Plaintiffs,  vs.  National Football League and NFL Properties LLC, successor-in-interest to NFL Properties, Inc.,  Defendants.
THIS DOCUMENT RELATES TO: DK#7151

No. 2:12-md-02323-AB MDL No. 2323

Hon. Anita B. Brody

Civ. Action No. 14-00029-AB

**MOTION TO ACCEPT JOINDER IN OBJECTIONS TO CO-LEAD CLASS  
COUNSEL'S PETITION FOR FEES FILED ON MARCH 28, 2017**

Undersigned counsel, LORENZO WHITE, and 94 others who are Retired NFL Players and members of the Class certified in this matter, file this Motion to Accept Joinder in Objections Filed on March 28, 2017 [ECF No. 7375] in response to Co-Lead Counsel's Petition for an Award of Attorney's Fees [ECF No. 7151], and in support thereof states as follows:

1. On March 8, 2017, this Court entered an Order [ECF 7261] holding, among other things, that all objections to Co-Lead Class Counsel's Petition for an Award of Attorneys' Fees [ECF 7151] must be filed by March 27, 2017.
2. On March 27, 2017, Undersigned counsel, LORENZO WHITE, and 94 others who are Retired NFL Players and members of the Class certified in this matter, attempted to file their joinder in objection through the online portal.

3. The online portal was not giving undersigned counsel the ability to file and the help desk for CM/ECF for the Eastern District of Pennsylvania was closed at the time the document was attempted to be filed.

4. In an abundance of caution, undersigned counsel sent an email to co-lead counsel Christopher Seeger, Esq., who had originally filed the Petition for an Award of Attorney's Fees, to inform them of the issue and attaching the joinder thereto.

5. Federal Rule of Civil Procedure 6(b)(1)(B) provides as follows:

When an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.  
Fed. R. Civ. Pro. 6(b)(1)(B).

6. The undersigned counsel acted in good faith in preparing and attempting to file the Joinder in Objections within the deadline, and sent an email to co-lead counsel in an attempt to minimize any potential prejudice filing the next day may have on co-lead counsel.

WHEREFORE, the undersigned attorney respectfully requests that the Court grant their motion to accept their joinder in objection as timely filed, even though it was filed the next day due to not having access to the e-filing portal on the 27<sup>th</sup>.

Respectfully submitted,

**WEISBERG & ASSOCIATES,  
Attorneys At Law**

s/ Lawrence Weisberg

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[m](mailto:LWeisberg@WeisbergLegal.com) Attorney for Individual Class

Members

**CERTIFICATE OF SERVICE**

I CERTIFY that the above has been filed with the Clerk of Court's EF/ECM system, which will provide service to all parties designated to receive service this March 29, 2017.

s/ Lawrence Weisberg

Lawrence Weisberg, Esq.

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

THIS DOCUMENT RELATES TO:  
  
ALL ACTIONS

**Hon. Anita B. Brody**

**ORDER**

**AND NOW**, this \_4th\_\_\_ day of April, 2017 it is **ORDERED** that, pursuant to Federal Rules of Civil Procedure 72(b), all petitions for individual attorneys' liens are **REFERRED** to the Honorable David R. Strawbridge, United States Magistrate Judge for the Eastern District of Pennsylvania, for a Report and Recommendation. I will decide Co-Lead Class Counsel's Petition for Award of Attorneys' Fees (ECF No. 7151), any objections to that Petition, and all similar filings related to fees associated with the Settlement Class as a whole.

s/Anita B. Brody

\_\_\_\_\_  
ANITA B. BRODY, J.

Copies **VIA ECF** on \_\_\_\_\_ to:

Copies **MAILED** on \_\_\_\_\_ to:

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

THIS DOCUMENT RELATES TO:  
  
ALL ACTIONS

**Hon. Anita B. Brody**

**ORDER**

**AND NOW**, this \_5th\_ day of April, 2017, it is **ORDERED** that the Motion to Accept Joinder in Objections to Co-Lead Class Counsel's Petition for Fees (ECF No. 7409) is **GRANTED**. The Notice of Joinder (ECF No. 7375) is accepted as timely filed.

s/Anita B. Brody

\_\_\_\_\_  
ANITA B. BRODY, J.

Copies **VIA ECF** on \_\_\_\_\_ to:

Copies **MAILED** on \_\_\_\_\_ to:

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

Hon. Anita B. Brody

Civ. Action No. 14-00029-AB

**RESPONSE OF CLASS COUNSEL THE LOCKS LAW FIRM  
TO OPPOSITIONS BY OBJECTORS TO  
CO-LEAD COUNSEL'S PETITION FOR ATTORNEY'S FEES**

The Locks Law Firm respectfully submits this Response to address arguments by objectors who contend that class counsel may not simultaneously receive common benefit fees and fees on individual contingency fee contracts.<sup>1</sup> This Response addresses the facts and jurisprudence that show that such individual contingency fee contracts are enforceable, including contracts with class counsel who will also receive common benefit fees.

<sup>1</sup> Objectors who raised these arguments are Cleo Miller (document no. 7161) and Steven Anthony Smith (document n. 7363).

In response to the Petition for Attorney’s Fees filed by Co-lead Counsel (documents no. 7151) (hereinafter “Fee Petition”), the objectors raised the issue of whether individual attorneys made representations to their clients that might justify revisiting or adjusting the terms of the fees provided in their individual contingency fee contracts. The objectors invoked the Motion filed by the Estate of Kevin Turner in a fee dispute with Podhurst Orseck, P.A. (document no. 7029).<sup>2</sup> (hereinafter “Turner Motion”). As originally filed, that Turner Motion suggested that contracts between class counsel and their individual clients are never enforceable. The Turner Estate, however, later disclaimed that argument in its Reply Brief (document no. 7114), and the objectors here make no attempt to develop the argument independently. This is not surprising, because controlling authority and established practice in other mass tort MDL proceedings foreclose any such attempt to abrogate reasonable contingency fee contracts, including those held by class counsel.

The objectors' references to the Turner Motion should be understood in the larger context of this proceeding, the jurisprudence of mass torts, and the established practice in mass tort MDLs. When viewed in that context, the objector's suggestion that individual contingency fee contracts may be abrogated categorically is invalid and contrary to the law.

<sup>2</sup> See Estate of Kevin Turner's Motion to Resolve Attorney Fee Dispute and to Appear as Counsel for Paul Raymond Turner, the Personal Representative of the Estate of Kevin Turner (document no. 7029) and Turner Reply (document no. 7114).

## **ARGUMENT**

### **I. The Turner Estate Disclaimed Any Categorical Argument about the Enforceability of Individual Contingency Fee Contracts, and the Objectors Have Adopted Turner’s Position and Raised Arguments Only about Their Individual Contracts.**

In their objections, several former players challenge the enforceability of individual contracts by proxy and invoke the Turner Motion which the Estate of Kevin Turner filed in an attempt to set aside the contract with Podhurst Orseck. *See, e. g.,* Cleo Miller, *Opposition to Co-Lead Class Counsel’s Petition for an Award of Attorneys’ Fees and Adoption of a Set-Aside of Each Monetary Award, and Opposition to Lamkenmolo’s [sic] Fee Petition* (document no. 7161) (hereinafter “Miller Objection”), at 5–6; Steven Anthony Smith, *Notice of Joinder in Estate of Kevin Turner’s Motion to Resolve Attorney Fee Dispute and Appearance as Counsel for Steven Anthony Smith* (document no. 7363) (hereinafter “Smith Notice of Joinder”), at 1 & *passim*.

As originally submitted, the Turner Motion appeared to levy a categorical challenge to individual contingency fee contracts and suggested that all contracts between class counsel and their clients became unenforceable once a class was certified in this MDL proceeding. *See* Turner Motion at 1–2 (“[The] contingency fee agreement that Kevin Turner and Podhurst entered into . . . was superseded by the certification of a national class of which Mr. Turner was a member”); *id.* at 4 (“[The contingency fee agreement] had become inoperative as a matter of law when Podhurst undertook to represent a national class.”). For this reason, the Locks Law Firm filed a brief in response to the Turner Motion on January 19, 2017 (document no. 7085) in which the



firm explained that any categorical attempt to abrogate the individual contingency fee contracts was legally and factually incorrect. *See* Locks Response at 5-10.<sup>3</sup>

In response, the Turner Estate filed a Reply that expressly disclaimed any such categorical arguments. It acknowledged the status of the Locks Law Firm as class counsel in this case, explained that the Turner Estate “takes no position with respect to the fees that the Locks Law Firm may receive in accordance with the terms of the Settlement Agreement”, and clarified that “any fee-related or other issues between the Locks Firm and its clients are not within the purview of [its] Motion.” *Estate of Kevin Turner’s Reply in Further Support of its Motion to Resolve Attorney Fee Dispute* (document no. 7114) (hereinafter “Turner Reply”) at 17. *See also id.* at 2 (“[T]he Turner Estate is not asserting universally that all contingency fee agreements between all class members and their respective counsel involved in this action are unenforceable.”). Rather, the Turner Reply Brief made clear that the Turner Estate challenged only “the particular circumstances surrounding and terms of the 2012 Retainer Agreements [between Turner and Podhurst] relative to this class action”. *Id.*

The objectors who have invoked the Turner Motion in their response to the Fee Petition have expressly adopted the Turner Reply. *See* Smith Notice of Joinder at 1 (“Class plaintiff Steven Anthony Smith (Steven Smith) hereby joins, adopts, and incorporates by reference, in its entirety, Estate of Kevin Turner’s motion to resolve attorney fee dispute (“Motion”) (ECF 7029) and Estate of Kevin Turner’s reply in further support of the Motion (ECF 7114)”). Or, they have framed their arguments around particular contingency fee contracts they believe are excessive and unwarranted and use

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<sup>3</sup> Document no. 7085.

the Turner Motion to bolster those arguments. *See* Miller Objection at 5–6 (objecting to individual retainers that request a “40% fee agreement” in which any “work related solely to individual cases” was “*de minimis*”).

There is, however, no argument before this Court that firms that have served in two capacities — performing extensive work on behalf of the class in the role of class counsel while also laboring thousands of hours to advocate for their individual clients pursuant to retainer agreements — are in any way disqualified from receiving reasonable compensation for both types of work. Further, arguments over individual contingency fee contracts are not appropriate for resolution in the present proceeding, since they would require this Court to conduct discovery and fact-finding focused on the specific negotiations between each objecting player and his respective lawyers. That is not the exercise in which this Court is presently engaged.

In its Response to the Turner Motion, the Locks Law Firm addressed the apparent suggestion that the certification of a class automatically results in the invalidation of all contingency fee contracts between class counsel and their individual clients. That categorical argument is at odds with the on-the-ground reality in complex MDL proceedings. It is also incompatible with the Rules Enabling Act and statements by the Supreme Court about the limitations that the Enabling Act places on Rule 23. It is contradicted by Third Circuit precedent on the supervisory powers of district courts in reviewing attorney’s fees. Locks Response at 9-14. Because the Turner Reply disclaims any reliance on that categorical argument, and because the objectors who raise the issue in response to class counsel’s Fee Petition have adopted the Turner Motion and Reply in full, this Court does not have before it any across-the-board challenge to the

enforceability of individual contingency fee contracts. Even if there were such a challenge, and there is not, the jurisprudence on the issue and the practical realities in mass torts foreclose any such categorical challenge.

**II. A Categorical Argument Against the Enforceability of Individual Contingency Fee Contracts Ignores the History and Reality of Mass Torts and this Proceeding and Would Upend the Allocation and Award of Common Benefit Fees.**

In its January 19 Response to the Turner Motion, the Locks Law Firm set forth a detailed description of the type of work that the firm has performed in representing well over a thousand individual clients while also serving as class counsel in these proceedings. The Locks Response described the downward adjustments to its rates in individual contingency fee contracts it negotiated to ensure that clients were paying a reasonable fee for the firm's individual representation. That was separate (and always has been separate) from the compensation the firm would receive through common benefit fees. The Locks Law Firm explained that any categorical challenge to the enforceability of individual contingency fee contracts would disregard the extensive work the firm has performed in highly engaged individual representation of its clients, while it was also advocated and negotiated on behalf of the class in this complex and difficult proceeding.

The Affidavit of Gene Locks, attached as Exhibit A, provides further context for that on-the-ground reality. Gene Locks is the founder of the Locks Law Firm and has been one of the leaders in the mass tort bar for more than forty years. He has been involved as co-lead class counsel, class counsel, liaison counsel, and/or lead negotiator on many of the largest mass tort actions of the last several decades. Locks Aff. at ¶¶ 2-3. Mr. Locks sets forth a list of the mass tort proceedings in which he has been involved

since the year 2000 and explains that in all those cases “...there has never been any personal injury MDL which resulted in a class action or global settlement wherein the individual contracts for the personal injury victims were voided.” Locks Aff. ¶¶ 4-6.

That consistent record is reflected in many mass tort MDL proceedings in which the district courts issued orders that made clear the enforceable nature of individual contingency fee contracts in parallel with a firm’s simultaneous right to a common benefit fee award based on common benefit work performed. Following is a list of illustrative cases (in no particular order) in which the common benefit order either expressly noted that individual contracts remain enforceable or discussed the source and allocation of the common benefit funds in terms that made clear that individual contracts remained in effect.

- In re Ortho Evra Products Liability Litigation, 1:06-CV-40000 (N.D. Ohio) (Katz, J.): In an order dated August 28, 2006, the district court established a common benefit fund “for the fair and equitable sharing among plaintiffs of the cost of services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation.” *Case Management Order No. 9 Common Benefit Order (Establishing Common Benefit Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for MDL Administration and Otherwise for Plaintiffs’ General Benefit)*, at 1. The fund was underwritten through assessments on the gross monetary recovery obtained by each claimant. *See id.* at 2–3. Judge Katz expressly provided that “Nothing in this Order shall be deemed to modify, alter, or change the terms of any fee contracts between any plaintiffs’ counsel and their individual clients.” *Id.* at 4. (Emphasis added)
- In re Serzone Products Liability Litigation, 2:02-MD-01477 (S.D.W.V.) (Goodwin, J.): In an order dated February 11, 2003, the district court established a common benefit fund “to provide for reimbursement of costs and payment of attorneys’ fees to the [Plaintiffs Steering Committee] and other attorneys who have been authorized by the PSC . . . to perform work for the common benefit of plaintiffs.” *Pretrial Order #5*, at 2. That fund was underwritten by a 9% assessment on the gross recovery obtained by claimants. Seven percent of that assessment “shall be deemed fees to be subtracted from the attorneys’ fees portions of individual fee contracts.” *Id.* at 2. In a subsequent order dated May 16, 2007, the district court ruled on a request by class counsel for a \$20,000,000

award of common benefit costs and fees. The court awarded \$12,664,000 in costs and fees. In the process of explaining its ruling, the court focused (among many other factors) on the distinction between “hours . . . devoted to the claims of individual plaintiffs” that would instead be compensated through the individual fee contracts. *In re Serzone Prods. Liab. Litig.*, 2007 WL 7701901, at \*2 (W.D.W.V., May 16, 2007).

- *In re Bextra and Celebrex Marketing, Sales Practices and Products Liability Litigation*, M:05-CV-01699 (N.D. Cal.) (Breyer, J.): In an order dated February 27, 2006, the district court established a common-benefit expense fund. See *Pretrial Order No. 8, Common Benefit Order (Establishing Common Benefit Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for MDL Administration and Otherwise for Plaintiffs’ General Benefit)* (Feb. 27, 2006), at 2. That fund provided for the payment of “attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients.” *Id.* at 6. It was funded through an assessment on the gross recovery that individual claimants secured, part of which was “deemed fees to be subtracted from the attorneys’ fees portions of individual fee contracts.” *Id.* at 4.
- *In re Baycol Products Liability Litigation*, MDL No. 1431 (D. Minn.) (Davis, J.): In an order dated June 14, 2002, the district court established a procedure for creating a common benefit fund “to secure an equitable reserve for a future allocation of counsel fees and costs for common benefit work.” *In re Baycol Products Liability Litigation*, 2002 WL 32155266 (D. Minn., June 14, 2002). The order required a 6% set-aside from the gross recovery of all claimants and provided that “Four percent (4%) shall be deemed fees to be subtracted from the attorneys’ fees portions of individual fee contracts, and two percent (2%) shall be deemed costs to be subtracted from the client portions of individual fee contracts.” *Id.* at \*4.
- *In re Propulsid Products Liability Litigation*, 2:00-MD-01355 (E.D. LA) (Fallon, J.): In an order dated December 27, 2001, the district court established a common benefit fund to compensate the Plaintiffs’ Steering Committee and other counsel who “provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients.” *Pre Trial Order No. 16 (Establishing Plaintiffs’ Litigation Expense Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for Common Benefit)*, at 4–5. That order made clear that the fund would not “be used to pay for services and expenses primarily related to a particular case, such as the deposition of a treating physician” even if “such activity results in some incidental and consequential benefit to other plaintiffs.” *Id.* at 5. Such individual work would instead be encompassed within the fees provided in individual retainer agreements.

- In re Actos (Pioglitazone) Products Liability Litigation, 6:11-MD-02299 (W.D. LA) (Doherty, K.): In an order dated July 10, 2012, the district court established a common benefit fund for the payment of attorneys' fees and cost reimbursement [for] time expended, costs incurred, and activity . . . for the common benefit." *Case Management Order: PSC's Management of Timekeeping, Cost Reimbursement, and Related Common Benefit Issues*, at 2. The court expressly provided that "no time spent on developing or processing individual issues in any case for an individual client (claimant) will be considered or should be submitted" through the common benefit process but rather (by necessary implication) will be enforced through individual retainer agreements. Three years later the court issued a holdback order dated September 1, 2015 directing defendants to set aside \$25,000,000 or 8.6% of the total anticipated recovery to underwrite the common benefit fund. *Case Management Order: Holdback Order*, at 5–6.
- In re Phenylpropanolamine (PPA) Products Liability Litigation, 2:01-MD-01407 (W.D. WA) (Rothstein, J.): In an order dated August 2, 2004, the district court clarified and expanded upon an earlier order in which it had established a common benefit fund through assessments of gross recoveries by claimants for compensating "activities and their related costs that substantially benefited and advanced the plaintiffs' generic claims in this litigation toward a favorable resolution for all or for a substantial, identifiable group of plaintiffs in cases consolidated in these MDL proceeds, including activities and their related costs in connection with the settlement of all pending claims as against one or more defendants." *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 2004 WL 1784348, at \*1 (W.D. WA, Aug 2, 2004). The district court explained that "time spent on individual cases (i.e. discovery, gathering medical records, client communications, settlement efforts) will not be recognized as compensable" through common benefit fees but rather (by clear implication) through individual fee arrangements. *Id.* at \*2.

Moreover, the argument by the objectors is contradicted by the single largest mass tort settlement in this Court: namely, *In re Diet Drug Litigation*. In that case, contingency fee contracts were never challenged unless there were issues of fraud and dishonesty. *Locks Aff.* at ¶¶ 4 and 14. Rather, they were upheld at all times, whether or not the contracts were with class counsel, co-lead counsel, or other attorneys who applied for and were granted an award of common benefit fees. *Id.* There were multiple orders approving the settlement and none ever voiding a contingency fee contract. *Locks Aff.* at ¶ 14.



Simply put, the wholesale abrogation of individual contingency fee contracts does not happen in mass tort MDLs. The reasons for the long-established practice of respecting individual contracts in parallel with common benefit fees are clear and compelling. Abrogation would negatively impact both the common benefit fee allocation process and the interests of claimants in securing speedy and effective recovery.

First, if district courts were to abrogate individual contracts, the allocation of common benefit fees among class counsel would have to be driven primarily by the number of individual clients each lawyer represents and the size of their recovery. In this proceeding, the number of clients represented by participating counsel and the value of their claims already play a necessary role in the allocation of common benefit fees when the representation of those clients has a substantial impact on the viability of the settlement. That has been particularly true in this case. *See* Locks Response at 6-9. If this Court were to entertain an argument that class counsel may never maintain contingency fee contracts with any of their individual clients, then the size of class counsel's client base and the value of their claims would become the principal driver of common benefit fees, not just a significant factor. If individual contracts were deemed unenforceable, well-established principles of *quantum meruit* and basic fairness would require that the risk undertaken by class counsel and the years spent representing, counseling, and advocating for their individual clients — both before the Settlement was reached and in securing compensation under the Settlement matrix — would have to be compensated fully from the common benefit fees. *Id.*

Second, if this Court were to accept the objectors' categorical arguments, then the Court would have to delay an award of common benefit fees until all or most of the

monetary awards are paid to former players under the Settlement Agreement. An abrogation of individual contingency fee contracts would mean that common benefit fees must cover all work done by class counsel in conjunction with these proceedings, not just work performed on behalf of the class in furtherance of the Settlement and MDL. Locks Response at 8. It would have to cover work performed by class counsel for individual clients to secure monetary compensation under the Settlement matrix. *Id.* The Court could not allocate those fees without knowing which attorneys have secured compensation for their clients and in what amounts. No former NFL player has yet received payment of a monetary award under the Settlement, and substantial work remains to be done by firms representing individual clients to prepare and submit claims and advocate for full relief under the matrix.<sup>4</sup>

Third, several objectors portray individual contracts as some kind of unfair *per se* double recovery, and thus subject to abrogation. If the individual contingency fee contracts between class counsel and their clients were invalidated wholesale on that spurious basis, some former players would be required to pay fees for their individual representation, while others would not. There are many attorneys who have never played

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<sup>4</sup> In this connection, the Miller Objection asserts that former players seeking compensation under the Settlement only require “paralegal work” that “can be accomplished for a few thousands dollars of clerical worker time.” Miller Objection at 5 & n.2. This betrays a complete lack of understanding of the tasks necessary to secure the assistance of highly qualified medical professionals, prepare claims that will accurately set forth the diminished capacities that many former players suffer, and ensure proper compensation under the complex requirements of the Settlement and the terms of the Settlement matrix. It also erases the time spent working for individual players over the course of years to determine the potential benefits and downsides of Settlement, the risks of litigation, and how their individual interests may best be served. Paralegals and clerical workers may have a role to play in helping to secure compensation for former players under the Settlement, but it is secondary.



any role in the class action or the MDL, but they represent individual players. Compensation for those lawyers will come through contingency fee contracts with their clients.<sup>5</sup> Former players represented by those lawyers and firms will pay some reasonable fee for their assistance in pursuing claims through the Settlement matrix, yet (purportedly) players represented by class counsel would not. That is *per se* unfair and makes no sense. There is no reason that some former players should pay for individual representation and others should not, solely because the former are represented by counsel not connected to the MDL and the latter by attorneys who serve in the dual role as class counsel and counsel under individual contingency fee contracts.

### **III. Certification of a Class Under Rule 23 Cannot Produce a Categorical Abrogation of Individual Contingency Fee Contracts**

Certification of a class under Rule 23 cannot, by its own force, abrogate preexisting contracts between lawyers and their clients. Any such argument is foreclosed by the Rules Enabling Act, which forbids a Federal Rule of Civil Procedure to “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). A federal district court has the inherent power to supervise contingency fee awards in order to ensure that they are not excessive, but the undoubted supervisory authority to prevent abusive contingency fees is not specific to class actions and provides no authority for denying altogether the compensation of class counsel through individual fee agreements.

Like all Federal Rules of Civil Procedure, Rule 23 was adopted pursuant to the Rules Enabling Act of 1934, which commands that no rule may “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). As the Supreme Court emphasized

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<sup>5</sup> The objectors do not suggest that lawyers with no role of any kind in the class or the MDL would be compensated through common benefit fees.

in *Amchem*, “Rule 23’s requirements must be interpreted in keeping . . . with the Rules Enabling Act” and its prohibition against abridgement or modification of any rights that are substantive in character. *Amchem Prods. v. Windsor*, 521 U.S. 591, 612–613 (1996).<sup>6</sup> The enforceability of a contract is a question of substantive right that Rule 23 cannot abridge. Thus, in *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309–2310 (2013), the Supreme Court said “it is likely that” an interpretation of Rule 23 “invalidating private arbitration agreements denying class adjudication[] would be an ‘abridg[ment]’ or ‘modif[ication]’ of a ‘substantive right’ forbidden to the Rules.” (quotations and alterations in original).

Federal district courts have inherent authority to supervise the terms of contingency fee contracts in the proceedings before them and, in appropriate cases, to order adjustments to the terms of those contracts in order to ensure that the court’s processes are not used to exploit litigants. That power is not particular to class proceedings and does not depend on Rule 23 for its authority, nor could it. Rather, this Court’s power to review the terms of a negotiated contingency fee contract arises from its supervisory authority. As the Third Circuit has explained, “in its supervisory power over the members of its bar, a court has jurisdiction of certain activities of such members, including the charges of contingency fees.” *Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3d Cir. 1973). That authority rests in part on the substantive law underlying the particular dispute before the Court. Thus, in *Schlesinger*, the Third Circuit emphasized the importance of federal admiralty law and the status of a seaman as a “special ward” in

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<sup>6</sup> Mr. Locks served as co-lead counsel and represented the class claimants in *Georgine v. Amchem Prods.*, 878 F. Supp. 716 (1994), the underlying case that led to *Amchem Prods. v. Windsor Prods.*, 521 U.S. 591, 612–613 (1996).

that substantive law framework when describing the review of contingency fee awards by district courts in maritime cases. *Id.* at 140–141; *see also* Tobias Barrington Wolff, Managerial Judging and Substantive Law, 90 Wash. U. L. Rev. 1027, 1048–1060 (2013) (discussing the relationship between the underlying substantive law and a district court’s use of its inherent powers to review contingency fee awards).

The same principles hold true in a class action. As the Third Circuit explained in *Dunn v. H.K. Porter, Inc.*, 602 F.2d 1105, 1114 (1979), a district court relies on its “supervisory authority over those practicing before it” when it fulfills the “duties imposed by Fed. R. Civ. P. 23(e)” to review contingency fee contracts between class counsel and class members. And, as the Third Circuit also held in *Dunn*, where a fee has been expressly and voluntarily negotiated by the class member, “courts should be loathe to intrude into a contractual relationship between an attorney and client” for fear of “discourage[ing] the prosecution of risky, but meritorious lawsuits.” *Id.* at 1111–1112. Such intervention is not warranted in a class action proceeding where many contingency fee contracts between class counsel and their clients “were entered into prior to the initiation of suit, and apparently with considerable preliminary discussion” and there was “no misconduct on the part of the lawyers.” *Id.* at 1112–1113.

If the objectors to the Fee Petition or any other individual players believe that their lawyers have committed acts of misconduct or that the fees they are charging are inappropriate for the work they have performed and the risk they have assumed, then those players can raise their arguments in an appropriate setting. This Court may have to determine whether there are any specific factual grounds for revisiting the terms of individual fee agreements. But any suggestion that the certification of a class and

Like the Turner Estate itself, the objectors who have invoked the Turner Motion are seeking to challenge the terms on which they negotiated their contingency fee contracts with their individual lawyers. The Locks Law Firm has no knowledge or view about those negotiations. But these objections cannot benefit from any argument that class certification categorically invalidates all contractual relationships between class counsel and their individual clients. Class counsel are entitled to be compensated appropriately for their years of work advocating for individual players and for the years of work ahead in securing the proper measure of compensation under the Settlement matrix. Any attempt to invalidate those contracts on a categorical basis is wrong on the law. It would erase the history and on-the-ground reality of these proceedings and the decades of mass tort MDL suits that have preceded this action; it would require a complete restructuring of the common benefit fee allocation process; it would threaten to misalign the incentives of attorneys advocating for players under the Settlement; and it would delay payment of common benefit fees. There is no reason to permit such a disruption of these proceedings.

The Locks Law Firm respectfully requests that this Court recognize that no categorical challenge to individual retainer agreements is properly before it and, if such a challenge were before the Court, that it should be rejected.

Dated: April 10, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date a true and correct copy of the foregoing Response of Class Counsel the Locks Law Firm to Oppositions by Objectors to Co-lead Counsel's Petition for Attorney's Fees was served via the Electronic Filing System to all counsel of record Case No. 2:12-md-02323-AB, MDL No. 2323.

DATE: April 10, 2017

/s/ *Gene Locks*  
Gene Locks, Class Counsel

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Civ. Action No. 14-00029-AB

**CO-LEAD CLASS COUNSEL'S OMNIBUS REPLY MEMORANDUM IN FURTHER  
SUPPORT OF PETITION FOR AWARD OF ATTORNEYS' FEES AND  
REIMBURSEMENT OF EXPENSES, ADOPTION OF SET-ASIDE FROM MONETARY  
AND DERIVATIVE CLAIMANT AWRDS, AND CASE CONTRIBUTION AWARDS  
FOR CLASS REPRESENTATIVES, AND IN OPPOSITION TO OBJECTORS' CROSS-  
PETITIONS FOR AWARDS OF ATTORNEYS' FEES AND EXPENSES**

## **TABLE OF CONTENTS**

I. INTRODUCTION .....	1
II. THE OBJECTIONS TO THE FEE PETITION ARE MERITLESS .....	4
A. Class Counsel’s Request for Attorneys’ Fees Is Not Premature.....	4
B. The Settlement Is Reliably Valued.....	5
C. The Percentage of Recovery Method Is the Proper First Analysis .....	8
D. Nothing Prevented the Alexander Objectors from Filing a Cross-Petition .....	11
E. The Alexander Objectors’ Evidentiary Complaints Are Specious.....	12
F. The Proposed Lodestar Multiplier Is Eminently Reasonable .....	14
G. The “Mega-Fund” or Declining Percentage Theory Should Not Apply Here .....	16
III. THE REQUESTED FIVE PERCENT SET-ASIDE IS APPROPRIATE AND NECESSARY TO COMPENSATE COUNSEL WHO PERFORM COMMON BENEFIT WORK RELATED TO SETTLEMENT IMPLEMENTATION OVER THE SETTLEMENT’S 65-YEAR TERM .....	18
A. Creation of the Separate 5% Set-Aside Fund.....	18
B. Future Petitions for Awards to Reimburse Counsel for Post-Effective Date Common Benefit Work from the Set-Aside Fund .....	23
C. Post-Effective Date Common Benefit Work and Expenses to Be Covered by the Set-Aside Fund.....	24
1. Drafting and Dissemination of Supplemental Notices.....	25
2. Implementation Paperwork and Retention of Key Officers .....	26
3. Work to Ensure Class Member-Friendly Registration and Claims Processes .....	26
4. Efforts to Widely Spread Information to Class Members .....	28
5. Efforts to Combat the Dissemination of Misinformation to Class Members .....	29
6. Selection of Advisory Panel Members and Appeals Advisory Panel Consultants.....	29



7. Selection and Orientation of Hundreds of Individuals to Serve as Qualified BAP Providers and Qualified MAF Physicians and Maintenance of These Physician Networks.....	30
8. Participation on Class Members’ Behalf in the Appeals Process .....	31
9. Monitoring the NFL Parties’ Funding of and Targeted Reserves for the Settlement .....	32
10. Establishing Procedures for and Participation in Periodic Audits of All Aspects of the Program, Including Medical Providers and Administrators .....	32
11. Replacing the Qualified BAP Providers and Qualified MAF Physicians, Appeals Advisory Panel Members, and Appeals Advisory Panel Consultants.....	32
12. Revisiting of the Science Every Ten Years .....	32
D. Certain Objectors’ Suggestion That the Attorneys’ Fees Qualified Settlement Fund Is Sufficient to Compensate Counsel for All Post-Effective Date Common Benefit Work.....	33
E. Certain Objectors’ Suggestion That They Should Not Have to Pay for Post-Effective Date Common Benefit Work at All .....	34
IV. THE THREE OBJECTOR PETITIONS FOR ATTORNEY’S FEES .....	36
A. The High Standards for Awarding Fees to Objectors .....	36
B. The Three Objector Cross-Petitions .....	38
1. The Faneca Objectors’ Petition.....	38
a. The Faneca Objectors Wrongly Take Credit for the Post-Hearing Modifications to the Settlement .....	40
b. The Faneca Objectors Overvalue the Post-Fairness Hearing Changes to the Settlement .....	42
c. The Fee Request Is Excessive .....	44
(1) Most of the Faneca Objectors’ Work Should Not Be Compensated Because It Did Not Benefit the Class .....	47
(2) The Requested \$20 Million Award Would Result in More Favorable Treatment of the Faneca Objectors Than of Class Counsel .....	53
2. The Armstrong Objectors’ Petition.....	56

a. The Armstrong Objectors’ Role Was Not Constructive .....	57
b. Causing Nearly Two Years of Delay Conferred No Benefit on the Class.....	59
c. The Armstrong Objectors Wrongly Take Credit for Three Post-Fairness Hearing Modifications to the Settlement .....	61
3. The Jones Objectors’ Petition .....	63
V. CONCLUSION .....	65

## TABLE OF AUTHORITIES

### Cases

<i>Alco Indus., Inc. v. Wachovia Corp.</i> , 527 F. Supp. 2d 399 (E.D. Pa. 2007) .....	6
<i>Allapattah Servs., Inc. v. Exxon Corp.</i> , 454 F. Supp. 2d 1185 (S.D. Fla. 2006) .....	17
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997) .....	48
<i>Armstrong v. Nat'l Football League</i> , 137 S. Ct. 607 (2016) .....	40
<i>Arnett v. Bank of Am., N.A.</i> , No. 3:11-CV-1372-SI, 2014 WL 5419125 (D. Or. Oct. 22, 2014) .....	38
<i>Azizian v. Federated Dep't Stores, Inc.</i> , No. C-03-3359 SBA, 2006 WL 4037549 (N.D. Cal. Sept. 29, 2006) .....	42, 47, 55
<i>City of Burlington v. Dague</i> , 505 U.S. 557 (1992) .....	15
<i>Daubert v. Merrill Dow Pharms., Inc.</i> , 509 U.S. 579 (1993) .....	1, 6
<i>Decibus v. Woodbridge Twp. Police Dep't</i> , Civ. A. No. 88-2926, 1991 WL 59428 (D.N.J. Apr. 15, 1991) .....	56
<i>Dewey v. Volkswagen Aktiengesellschaft</i> , 558 F. App'x 191 (3d Cir. 2014) .....	8
<i>Dewey v. Volkswagen of Am.</i> , 909 F. Supp. 2d 373 (D.N.J. 2012), <i>aff'd</i> , 558 F. App'x 191 (3d Cir. 2014) .....	37, 54
<i>Dunjee v. Davison Design &amp; Development</i> , No. 16-1486, ___ F. App'x ___, 2017 WL 65549 (3d Cir. Jan. 6, 2017) .....	10, 14, 15
<i>Faught v. Am. Home Shield Corp.</i> , 444 F. App'x 445 (11th Cir. 2011) .....	37
<i>Finch v. Hercules Inc.</i> , 941 F. Supp. 1395 (D. Del. 1996) .....	56
<i>Fraley v. Facebook, Inc.</i> , No. C 11-1726 RS, 2014 WL 806072 (N.D. Cal. Feb. 27, 2014) .....	38

<i>Great Neck Capital Appreciation Inv. P’ship, LP v. PricewaterhouseCoopers, LLP</i> , 212 F.R.D. 400 (E.D. Wis. 2002) .....	54
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983).....	24, 56
<i>In re Adelphia Commc’ns Corp. Sec. and Derivative Litig.</i> , No. 03 MDL 1529, 2006 WL 3378705 (S.D.N.Y. Nov. 16, 2006) .....	17
<i>In re AOL Time Warner ERISA Litig.</i> , No. 02 CV. 8853 (SWK), 2007 WL 4225486 (S.D.N.Y. Nov. 28, 2007).....	47
<i>In re AT&amp;T Corp. Sec. Litig.</i> , No. 00-5364 (GEB), 2006 WL 2786945 (D.N.J. Sept. 26, 2006) .....	51, 63
<i>In re Baby Products Antitrust Litig.</i> , 708 F.3d 163 (3d Cir. 2013).....	10
<i>In re Cardinal Health, Inc. Secs. Litig.</i> , 550 F. Supp. 2d 751 (S.D. Ohio 2008) .....	42
<i>In re Cathode Ray Tube (CRT) Antitrust Litig.</i> , MDL No. 1917, 2016 WL 6909680 (N.D. Cal. Oct. 24, 2016).....	46
<i>In re Cendant Corp. PRIDES Litig.</i> , 243 F.3d 722 (3d Cir. 2001).....	8, 15, 37
<i>In re Cendant Corp. Sec. Litig.</i> , 404 F.3d 173 (3d Cir. 2005).....	37, 38
<i>In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.</i> , No. 3:08-MD-01998, 2010 WL 3328249 (W.D. Ky. Aug. 24, 2010) .....	41
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 263 F.R.D. 110 (S.D.N.Y. 2009) .....	41
<i>In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.</i> , No. 1203, 2002 WL 32154197 (E.D. Pa. Oct. 3, 2002).....	20, 37, 63
<i>In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.</i> , MDL No. 1203, 2011 WL 2174611 (E.D. Pa. June 2, 2011) .....	20
<i>In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.</i> , 582 F.3d 524 (3d Cir. 2009).....	22, 58
<i>In re Domestic Air Transp. Antitrust Litig.</i> , 144 F.R.D. 421 (N.D. Ga. 1992).....	50

<i>In re Domestic Air Transp. Antitrust Litig.</i> , 148 F.R.D. 297 (N.D. Ga. 1993).....	45
<i>In re Excess Value Ins. Coverage Litig.</i> , 598 F. Supp. 2d 380 (S.D.N.Y. 2005).....	41
<i>In re Fine Paper Antitrust Litig.</i> , 751 F.2d 562 (3d Cir. 1984).....	55
<i>In re Freddie Mac Sec. Litig.</i> , No. 03-CV-4261 (JES) (S.D.N.Y. Oct. 27, 2006) .....	17
<i>In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.</i> , 55 F.3d 768 (3d Cir. 1995).....	5, 9
<i>In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.</i> , 851 F. Supp. 2d 1040 (S.D. Tex. 2012) .....	8
<i>In re Ikon Office Solutions, Inc., Secs. Litig.</i> , 194 F.R.D. 166 (E.D. Pa. 2000).....	16, 54
<i>In re Ins. Brokerage Antitrust Litig.</i> , 579 F.3d 241 (3d Cir. 2009).....	15
<i>In re Linerboard Antitrust Litig.</i> , No. 98-5055, 2004 WL 1221350 (E.D. Pa. June 2, 2004).....	16
<i>In re MetLife Demutualization Litig.</i> , 689 F. Supp. 2d 297 (E.D.N.Y. 2010) .....	46
<i>In re NASDAQ Mkt.-Makers Antitrust Litig.</i> , 187 F.R.D. 465 (S.D.N.Y. 1998) .....	18
<i>In re New Motor Vehicles Canadian Exp. Antitrust Litig.</i> , 842 F. Supp. 2d 346 (D. Me. 2012) .....	42
<i>In re Nat'l Football League Players' Concussion Injury Litig.</i> , 821 F.3d 410 (3d Cir. 2016).....	passim
<i>In re Nat'l Football League Players' Concussion Injury Litig.</i> , 307 F.R.D. 351 (E.D. Pa. 2015).....	passim
<i>In re Nat'l Football League Players' Concussion Injury Litig.</i> , 775 F.3d 570 (3d Cir. 2014).....	50
<i>In re Penn Cent. Secs. Litig.</i> , 560 F.2d 1138 (3d Cir. 1977).....	33

<i>In re Polyurethane Foam Antitrust Litig.</i> , 169 F. Supp. 3d 719 (N.D. Ohio 2016).....	41
<i>In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions</i> , 148 F.3d 283 (3d Cir. 1998).....	passim
<i>In re Prudential Ins. Co. of Am. Sales Practices Litig.</i> , 273 F. Supp. 2d 563 (D.N.J. 2003), <i>aff'd</i> , 103 F. App'x 695(3d Cir. 2004) .....	45, 46
<i>In re Puerto Rican Cabotage Antitrust Litig.</i> , 815 F. Supp. 2d 448 (D.P.R. 2011).....	45
<i>In re Qwest Commc'ns Int'l, Inc. Sec. Litig.</i> , No. 01-CV-01451-REB-CBS, 2007 WL 2087536 (D. Colo. July 17, 2007) .....	38
<i>In re Rite Aid Corp. Secs. Litig.</i> , 362 F. Supp. 2d 587 (E.D. Pa. 2005) .....	17
<i>In re Rite Aid Corp. Secs. Litig.</i> , 396 F.3d 294 (3d Cir. 2005).....	12, 16
<i>In re Riverstone Networks, Inc.</i> , 256 F. App'x 168 (9th Cir. 2007) .....	45
<i>In re Royal Ahold N.V. Sec. &amp; ERISA Litig.</i> , 461 F. Supp. 2d 383 (D. Md. 2006) .....	17
<i>In re TFT-LCD (Flat Panel) Antitrust Litig.</i> , No. M 07-1827 SI, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013), <i>appeal dismissed</i> , No. 13-16216 (9th Cir. June 12, 2014) .....	17, 37
<i>In re Tyco Int'l, Ltd. Multidist. Litig.</i> , 535 F. Supp. 2d 249 (D.N.H. 2007).....	17
<i>Institutionalized Juveniles v. Sec'y of Pub. Welfare</i> , 758 F.2d 897 (3d Cir. 1985).....	55
<i>Jackson v. Wells Fargo Bank, N.A.</i> , 136 F. Supp. 3d 687 (W.D. Pa. 2015).....	8
<i>King Drug Co. of Florence v. Cephalon</i> , No. 06-cv-01797-MSP, 2015 WL 12843830 (E.D. Pa. Oct. 15, 2015).....	17
<i>Lan v. Ludrof</i> , No. 1:06CV114-SJM, 2008 WL 763763 (W.D. Pa. Mar. 21, 2008) .....	54
<i>Landsman &amp; Funk, P.C. v. Skinder-Strauss Assocs.</i> , 639 F. App'x 880 (3d Cir. 2016) .....	5

<i>Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.</i> , No. 02-C05893 (N.D. Ill. Nov. 10, 2016).....	17
<i>Lobur v. Parker</i> , 378 F. App'x 63 (2d Cir. 2010) .....	46
<i>Lonardo v. Travelers Indem. Co.</i> , 706 F. Supp. 2d 766 (N.D. Ohio 2010).....	53
<i>MacFarland v. U.S. Fid. &amp; Guar. Co.</i> , 818 F. Supp. 108 (E.D. Pa. 1993) .....	6
<i>Mars Steel Corp. v. Cont'l Ill. Nat'l Bank &amp; Trust Co. of Chicago</i> , 834 F.2d 677 (7th Cir. 1987) .....	50
<i>Martin v. Foster Wheeler Energy Corp.</i> , No. 3:06-CV-0878, 2008 WL 906472 (M.D. Pa. Mar. 31, 2008) .....	38
<i>Masters v. Wilhelmina Model Agency, Inc.</i> , 473 F.3d 423 (2d Cir. 2007).....	5
<i>McDonough v. Toys R Us, Inc.</i> , 80 F. Supp. 3d 626 (E.D. Pa. 2015) .....	36, 37
<i>Milligan v. Toyota Motor Sales, U.S.A., Inc.</i> , No. C 09-05418 RS, 2012 WL 10277179 (N.D. Cal. Jan. 6, 2012) .....	48
<i>Mirfasihi v. Fleet Mortg. Corp.</i> , 551 F.3d 682 (7th Cir. 2008) .....	51
<i>Mirfasihi v. Fleet Mortg. Corp.</i> , No. 01 C722, 2007 WL 2608778 (N.D. Ill. Sept. 6, 2007).....	38, 46
<i>Newman v. Stein</i> , 58 F.R.D. 540 (S.D.N.Y. 1973) .....	36
<i>Park v. Thomson Corp.</i> , 633 F. Supp. 2d 8 (S.D.N.Y. 2009) .....	46, 54
<i>Parker v. Time Warner Entm't Co.</i> , 631 F. Supp. 2d 242 (E.D.N.Y. 2009) .....	46
<i>Patriot Party of Pa. v. Mitchell</i> , No. CIV. A. 93-2257, 1993 WL 313667 (E.D. Pa. Aug. 16, 1993) .....	56
<i>Pawlak v. Greenwalt</i> , 713 F.2d 972 (3d Cir. 1983).....	12

<i>Pennsylvania v. Del. Valley Citizen’s Counsel for Clean Air</i> , 478 U.S. 546 (1992).....	15
<i>Perdue v. Kenny A. ex. Rel. Winn</i> , 559 U.S. 543 (2010).....	15
<i>Priceline.com, Inc. v. Silberman</i> , 405 F. App’x 532 (2d Cir. 2010) .....	41
<i>Radcliffe v. Experian Info. Sols. Inc.</i> , 715 F.3d 1157 (9th Cir. 2013) .....	33
<i>Rankin v. McPherson</i> , 483 U.S. 378 (1987).....	3
<i>Reynolds v. Beneficial Nat’l Bank</i> , 288 F.3d 277 (7th Cir. 2002) .....	38
<i>Sch. Dist. of Philadelphia v. Deborah A.</i> , No. 08-2924, 2011 WL 2681234 (E.D. Pa. July 8, 2011) .....	56
<i>Shaw v. Toshiba Am. Info. Sys., Inc.</i> , 91 F. Supp. 2d 942 (E.D. Tex. 2000).....	18
<i>Sobel v. Hertz Corp.</i> , 53 F. Supp. 3d 1319 (D. Nev. 2014).....	47
<i>Spark v. MBNA Corp.</i> , 289 F. Supp. 2d 510 (D. Del. 2003).....	38, 45, 63
<i>Spencer v. Wal-Mart Stores, Inc.</i> , No. 03-104-KAJ, 2005 WL 3654381 (D. Del. June 24, 2005), <i>aff’d</i> , 469 F.3d 311 (3d Cir. 2006).....	56
<i>Student Pub. Interest Research Grp. of N.J., Inc. v. AT&amp;T Bell Labs</i> , 842 F.2d 1436 (3d Cir. 1988).....	15
<i>Sullivan v. DB Invs., Inc.</i> , 667 F.3d 273 (3d Cir. 2011).....	49
<i>Vasquez v. S.S. Pennock Co., Civ. A.</i> , No. 86-2288, 1987 WL 9781 (E.D. Pa. Apr. 21, 1987).....	56
<i>Waters v. Int’l Precious Metals Corp.</i> , 190 F.3d 1291 (11th Cir. 1999) .....	5
<i>Williams v. MGM-Pathe Commc’ns Co.</i> , 129 F.3d 1026 (9th Cir. 1997) .....	5



<i>Zawikowski v. Beneficial Nat’l Bank</i> , No. 98 C 2178, 2001 WL 290402 (N.D. Ill. Mar. 22, 2001) .....	41
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## **Statutes**

28 U.S.C. § 2101(c) .....	60
42 U.S.C. § 1988.....	15

## **Rules**

Fed. R. App. P. 42(b) .....	51
Fed. R. Civ. P. 23(e) .....	7, 49, 50, 64
Fed. R. Civ. P. 23(e)(2).....	39
Fed. R. Civ. P. 23(f).....	7, 50

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<i>Annotated Manual for Complex Litigation, Fourth</i> (rev. ed. 2016) .....	38, 50
5 William B. Rubenstein, Alba Conte, and Herbert Newberg, <i>Newberg on Class Actions</i> (5th ed. 2015).....	19, 22, 52

## I. INTRODUCTION

class gains are not real; (3) claims that “mega-funds” require a lower fee structure, even though the requested fee is in line with comparable cases; (4) the assertion that the proposed multiplier of 2.6 is too high, even though it is well within Third Circuit norms; (5) a demand that Class Counsel receive compensation on a claims-made basis, despite the fund being uncapped for the 65-year lifetime of the benefits; and (6) the assertion that Class Counsel did little to benefit the Class, notwithstanding this Court’s express findings on adequacy of representation.

In all, the meritless objections of a few die-hard objectors who fought the Settlement almost to the very end provide no genuine basis for denying the petition or for reducing the requested award.<sup>2</sup>

Equally meritless are the arguments against the Court’s adoption of the proposed 5% set-aside. To begin with, many (if not most) of these objections are simply lawyer-driven. For represented Class Members, the holdback will be deducted *only* from their counsel’s fees. Individual counsel simply dread the prospect of surrendering any portion of their fees – which they will earn, in large measure, only as a result of Class Counsel’s efforts in achieving and successfully defending the Settlement.

At any rate, as already spelled out in the opening papers and further developed below, a great deal of common benefit work to roll out the Settlement has already been performed and a great deal more will be necessary to ensure the proper implementation and smooth functioning of the Settlement over its lengthy term of 65 years. That work will include not only assisting Class Members (and, where applicable, their individual counsel), but also ongoing input into the composition of the bodies that will play a central role in the Settlement’s implementation,

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<sup>2</sup> No objector has challenged the requested Case Contribution (*i.e.*, incentive or service) Awards for the three Subclass Representatives. Accordingly, that request should be deemed unopposed.

including the MAF and BAP physicians and the Appeals Advisory Panel and its Consultants. Given the Settlement's lengthy term, there will be a regular need to replenish the membership of those bodies.

Besides that, adequate funds will be needed to incentivize lawyers down the road to get up to speed on the history of this litigation, the Settlement's details, and what will by then be the history of the Settlement's effectuation in order to step into the shoes of Class Counsel. Where a settlement will last for nearly seven decades – and pay claims throughout that time – common sense alone should suggest that such transitioning will need to occur multiple times.

Moreover, it is unfair and unreasonable for objectors to maintain that *65 years' worth* of future common benefit work should be paid for out of the common benefit fee award that Class Counsel are seeking from the Attorneys' Fees Qualified Settlement Fund, whose purpose is to compensate Class Counsel for all their work in *securing* the Settlement in the first place.

No more convincing are certain objectors' complaints that it is unfair to ask Class Members who already had Qualifying Diagnoses to contribute a set-aside. To the contrary, it would be unfair not to have those Class Members chip in their fair share to ensure that all Class Members realize the maximum benefits to which they are entitled under the Settlement.

Finally, there are the three objector cross-petitions for fees. Let us be clear. These are objectors who tried to scuttle the Settlement and whose intervention was primarily aimed at having settlement benefits denied to the entire Class. They are entitled to nothing. They chose which side of the "v." to appear on and fees are awarded to parties that prevail, not those that stand in the way of prevailing. As Justice Scalia once colorfully put it, one may not "ride with the cops and cheer for the robbers." *Rankin v. McPherson*, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting). Even on their own terms, these objectors seek wildly inflated awards, claiming

responsibility for settlement modifications that were, in most instances, the initiative of this Court, and claiming compensation for hours spent of trying (unsuccessfully) to derail the deal.

## **II. THE OBJECTIONS TO THE FEE PETITION ARE MERITLESS**

### **A. Class Counsel's Request for Attorneys' Fees Is Not Premature**

The Alexander Objectors<sup>3</sup> assert that the final value of the Settlement is “speculative” and “based on unrealistic assumptions” at this point and urge the Court to defer consideration of attorneys’ fees until actual payments are drawn from the Settlement Fund.<sup>4</sup> *E.g.*, ECF No. 7355, at 6-10 (Alexander Objectors); ECF No. 7161, at 7-9 (Objector Miller); ECF No. 7370, at 1 (Objector Anderson).<sup>5</sup> This claim is simply an attempt to rehash the arguments, already rejected by this Court and the Third Circuit, that the Settlement is of no benefit to the Class. The record amply supports the value of the Settlement, as determined by this Court. The fact that the payout will continue over 65 years does not prevent attorneys’ fees from being paid on the value of the benefits available for the Class to claim, not on the value of benefits already claimed. *E.g.*,

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<sup>3</sup> The so-called Alexander Objectors purport to be a 16-member remnant (*see* ECF No. 7355-1, at 1) of a group of what were formerly 38 objectors who had unsuccessfully appealed this Court’s Final Approval decision to the Third Circuit (*see* ECF No. 6552). The lead objector and namesake of this faction, Liyongo Patrise Alexander, no longer appears to be among their ranks.

<sup>4</sup> The Alexander Objectors complain that attorneys will be paid before players are. ECF No. 7355, at 1-3. Given that the Settlement will run for 65 years, it is inevitable that some attorneys will be compensated before many Class Members are. Unfortunately, major obstacles to an earlier distribution of benefits to Class Members were the multiple (and utterly meritless) objector appeals, which consumed much time while producing no benefit to Class Members. Counsel for the Alexander Objectors should be aware of this, having been in the thick of that wasteful endeavor. *E.g.*, ECF No. 6552 (Alexander Objectors’ notice of appeal).

<sup>5</sup> Unless otherwise noted, citations to objections and to Co-Lead Class Counsel’s opening memorandum in support of the fee petition (ECF No. 7151-1) are to the pages of the original document, not the ECF pagination.

*Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 F. App'x 880, 884 (3d Cir. 2016).<sup>6</sup> In awarding fees under a common fund theory, the Court need not determine the value of the fund with absolute specificity. Rather, it is enough to make a “reasonable assessment” of the fund’s value. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995); *accord In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 334 (3d Cir. 1998) (“reasonable estimate” suffices). As further discussed below, because Class Plaintiffs provided a reasonable estimate of the Settlement’s value, in the form of their actuarial expert’s assessment – which this Court accepted in approving the Settlement – the instant petition is ripe.<sup>7</sup>

#### **B. The Settlement Is Reliably Valued**

Objectors contend that “[t]here is no non-speculative data to support the computation of the ‘size of the fund’” and that “the monetary value of the Monetary Fund Award [sic] is unknown.” ECF No. 7355, at 3, 23; ECF No. 7161, at 2. These arguments are essentially recycled attacks on the Settlement itself, inasmuch as they question the adequacy of assumptions and calculations made by the Settling Parties in negotiating the Settlement, by this Court in

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<sup>6</sup> *Accord Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (“An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not.”); *Waters v. Int’l Precious Metals Corp.*, 190 F.3d 1291, 1295, 1297-98 (11th Cir. 1999) (“[N]o case has held that a district court must consider only the actual payout in determining attorneys’ fees.”); *Williams v. MGM-Pathe Commc’ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (per curiam) (“[T]he district court abused its discretion by basing the fee on the class members’ claims against the fund rather than on a percentage of the entire fund.”) (footnote omitted).

<sup>7</sup> Some objectors argue that attorneys who receive common benefit funds should not be able to receive money from individual Class Member clients under their individual retainer agreements. *E.g.*, ECF No. 7370, at 3 (“The Court should void all individual fee contracts where the attorney representing a class member is also receiving a portion of the common benefit attorney’s fees.”). This issue has been addressed in a separate brief filed by The Locks Law Firm (ECF No. 7463).

approving the Settlement, and the Third Circuit in affirming this Court’s approval decision. The contention that Class Counsel have not provided this Court with adequate valuation data – after the Court thoroughly reviewed these data, received and evaluated substantial briefing before the Fairness Hearing, conducted an extensive Fairness Hearing, received and evaluated post-Fairness Hearing briefing, and approved the Settlement based upon it – is simply untenable. The Court made its findings with respect to the Settlement’s valuation and raising the same issue is an impermissible collateral attack on this Court’s earlier rulings.<sup>8</sup>

As the Court stated, “[t]he Settlement value has been the subject of extensive medical and statistical analysis. It was negotiated on the basis of “actuarial data and analyses performed by [the] economic experts” – separate actuarial teams retained by Class Counsel and the NFL – under the supervision of Special Master Golkin. *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 364 (E.D. Pa. 2015). Thus, the Court *has already acknowledged* that the value

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<sup>8</sup> The Alexander Objectors challenge the report of Dr. Thomas Vasquez, Plaintiffs’ actuarial expert, on *Daubert* grounds. See ECF No. 7355, at 25 n.19 (citing *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993)). Setting aside that they improperly relegate such a significant challenge to a footnote, cf. *MacFarland v. U.S. Fid. & Guar. Co.*, 818 F. Supp. 108, 111 (E.D. Pa. 1993) (“[B]ecause this argument has been relegated to footnote status . . . we do not see the need to address [it].”), any *Daubert* challenge to Dr. Vasquez’s report should have been made at the Fairness Hearing. That was not done. In a different context, a *Daubert*-type challenge was belatedly raised to the Third Circuit regarding Plaintiffs’ medical experts, after the Fairness Hearing. The Third Circuit rejected it as both waived and as lacking any merit, noting that it “ha[s] never held that district courts considering the fairness of a class action settlement should consider the admissibility of expert evidence under *Daubert*.” *In re Nat’l Football League [“NFL”] Players Concussion Injury Litig.*, 821 F.3d 410, 442, 443 (3d Cir. 2016). The Alexander Objectors do not address why they failed to assert a *Daubert* challenge to Dr. Vasquez’s calculations at the Fairness Hearing. Much less do they provide a rationale for why a *Daubert* inquiry is necessary for a court’s adjudication of a *fee petition*, which will not be decided by a jury. Cf. *Alco Indus., Inc. v. Wachovia Corp.*, 527 F. Supp. 2d 399, 405 (E.D. Pa. 2007) (“In the context of preparing for a bench trial, it is not necessary to apply the *Daubert* standard with full force in advance of trial.”). They certainly offer not a scintilla of authority holding that a *Daubert* inquiry is required at the fee petition stage.

of the Settlement has been reasonably estimated.<sup>9</sup> As previously established, Class Counsel secured a benefit<sup>10</sup> of nearly \$1.2 billion for the Class:

BENEFIT	AMOUNT/VALUE	SOURCE
Monetary Award Fund	\$950,000,000	ECF No. 6167, at 4 (NFL Concussion Liability Forecast)
Baseline Assessment Program	\$75,000,000	Settlement § 23.1(b)
Education Fund	\$10,000,000	Settlement § 23.1(c)
Notice Costs	\$4,000,000	Settlement § 14.1(b)
Claims Administration	\$11,925,000	Decl. of Orran Brown, Sr.
Attorneys' Fees Provision	\$112,500,000	Settlement § 21.1
<b>TOTAL:</b>	<b>\$1,163,425,000</b>	

With the benefit of actual data from the Claims Administrator, supporting a higher Class Member participation rate in the Settlement than originally projected, Dr. Thomas Vasquez of Ankura Consulting, who had previously valued the Settlement during the Rule 23(e) fairness proceedings (ECF No. 6423-21), has revised his valuation of the Settlement upwards, concluding that the MAF alone is now worth over \$1 billion. *See* Supplemental Declaration of Christopher

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<sup>9</sup> The Alexander Objectors also make the completely mystifying argument that Dr. Vasquez's report "does not pertain to the Settlement actually approved by the Court." ECF No. 7355, at 39. Dr. Vasquez's projections were used by Class Plaintiffs, the Special Master, and the Court in considering the Settlement's value. *In re NFL Players' Concussion Injury Litig.*, 307 F.R.D. at 375.

<sup>10</sup> Two objectors argue either against an award under a common fund theory – which factors in risk, *see In re Prudential*, 148 F.3d at 340 – or that the proposed 2.6 multiplier is unwarranted on the ground that Class Counsel had no risk of nonpayment as of August 2013, when the term sheet was announced. ECF No. 7370, at 3 (Objector Anderson); ECF No. 7161, at 4 (Objector Miller). Even the most cursory understanding of this litigation reveals this as a fatuous argument. In January 2014, this Court *rejected* the first formal settlement agreement presented by Class Counsel (ECF No. 5658). After negotiating a revised agreement, to which this Court granted preliminary approval in July 2014 (ECF Nos. 6083-84), Class Counsel then had to defend it against multiple objectors during the Rule 23(e) proceedings and even against a novel Rule 23(f) challenge in the Third Circuit. After the November 2014 Fairness Hearing, Class Counsel needed to secure further concessions from the NFL with respect to certain modifications proposed by the Court. And after final approval in April 2015, the Settlement was the subject of multiple Third Circuit appeals by objectors determined to scuttle the Settlement (including by Objector Anderson) and, thereafter, two *certiorari* petitions in the Supreme Court.



A. Seeger, dated Apr. 10, 2017 (“Seeger Supp. Decl.” or “Seeger Supplemental Declaration”) (filed contemporaneously herewith), Ex. JJ (An Updated Analysis of the NFL Concussion Settlement), at 3 & Table 1.

**C. The Percentage of Recovery Method Is the Proper First Analysis**

Nor is there any basis for the Alexander Objectors’ suggestion that a percentage-of-the-recovery method is not warranted here. ECF No. 7355, at 21-27. As the Third Circuit has stated, “[t]he percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund “in a manner that rewards counsel for success and penalizes it for failure.” *In re Prudential*, 148 F.3d at 333 (citation and internal quotation marks omitted). The lodestar method is typically applied only in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the monetary value of the relief is too small to provide adequate compensation. *Id.* It may also be applied in cases where the nature of the recovery does not allow the determination of the settlement’s value necessary for application of the percentage-of-recovery method. *Id.*; accord *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001) (citing *In re Prudential*, 148 F.3d at 333).

As Class Counsel discussed in their Fee Petition, the principles employed in assessing a percentage-of-the-fund common fund attorneys’ fees claim are appropriate here because the different settlement benefits secured by Class Counsel, totaling well over \$1 billion in value, are a *constructive* common fund. *See, e.g., Dewey v. Volkswagen Aktiengesellschaft*, 558 F. App’x 191, 197 (3d Cir. 2014); *Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 713 (W.D. Pa. 2015) (“[G]iven that each of these amounts will be paid by defendants, the economic effect essentially is that of a common fund.”); *In re Heartland Payment Sys., Inc. Customer Data Sec.*

*Breach Litig.*, 851 F. Supp. 2d 1040, 1072 (S.D. Tex. 2012) (“Having two funds—one for the claimants, one for the attorneys—is a well-recognized variant of a common-fund arrangement.”); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 821 (“Although . . . the fee was a separate agreement, thus superficially resembling the separate awards in statutory fee cases, private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case.”). Furthermore, although it is uncapped, there is a clearly delineated fund recovered on behalf of the Class that lends itself to valuation. In fact, as noted above, the MAF has been valued by both Class Plaintiffs’ and the NFL Parties’ experts.

Ultimately, the Alexander Objectors’ argument against a percentage-of-recovery fee award rests on the already rejected contention that the Settlement does not provide value for the Class.<sup>11</sup>

In a further collateral attack on the Court’s earlier rulings, the Alexander Objectors then challenge the valuation of the Settlement. They suggest that the present value comes to “only” \$607,281,000, and then calculate a percentage of this fund using this figure. *See* Declaration of Kenneth McCoin (ECF No. 7355-1), at ¶ 6. That argument is unavailing. Even if the alleged present value of the Settlement benefits were taken into consideration, Class Counsel’s request for \$106.82 million in fees (the reimbursement of expenses would not be factored in here) would nonetheless amount to only about 17-1/2% of the recovery – still well within the acceptable range in percentage-of-recovery fee class cases. Even accepting the methodology, the Alexander

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<sup>11</sup> The Alexander Objectors assert that the inability of Claims Administrator Brown to pinpoint all future administrative costs somehow casts the value of the MAF into doubt. ECF No. 7355, at 24. That contention makes no sense; the MAF funds are used to compensate Retired NFL Football Players and Derivative Claimants, not pay administrative costs. Comparing the methodology of how the Claims Administrator can estimate expenses is an apples-to-oranges comparison with Dr. Vasquez’s calculations.

Objectors leave out of their asserted \$607,281,000 value the other benefits that Class Counsel secured for the Class. These were not only the BAP (worth \$75 million) and the Education Fund (\$10 million), but also various tabs that ordinarily come out of a fund but which will be picked by the NFL, including the cost of notice (\$4 million); the cost of claims administration (\$11.925 million); and attorneys' fees and expenses for common benefit work (\$112.5 million). Thus, even under their valuation theory, Class Counsel secured a total present value of \$719,456,000. The percentage of the recovery that Class Counsel's fee award would represent would thus be less than 15 percent, which as discussed below, is still well within the reasonable range of fee awards in so-called "mega-fund" cases.

Disregarding immediate benefits also leads the Alexander Objectors to mistakenly invoke *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013). *Baby Products* was a case in which class counsel ended up with 40 percent of the settlement as fees, and even then more than half the total settlement went to a *cy pres* distribution. *Id.* at 169-70, 179. Comparing this case to *Baby Products* is simply another collateral attack on the Settlement – and a highly strained one at that.<sup>12</sup>

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<sup>12</sup> The further objection to the 5% set-aside, ECF No. 7355, at 29, ignores the simple fact that the fee petition request is for work done *to date* – as very clearly laid out in the Class Counsel's opening papers – and that the 5% holdback is for the purpose of paying for future work performed on behalf of Class Members. The Alexander Objectors contend that the 5% holdback would produce \$45,470,000. They base this on "Class Counsel's projected Monetary Award Fund" – *i.e.*, \$950 million. The Alexander Objectors, though, cannot have it both ways – claiming a value of just over \$600 million in their effort to minimize the recovery scored by Class Counsel, and then turning around and resorting to the very \$950 million value that they elsewhere attack, so as to maximize the fees that all Class Counsel might potentially earn from the set-aside over the 65-year life of the Settlement.

Under both the percentage-of-recovery method, and using a lodestar cross-check, the requested fees are eminently reasonable.<sup>13</sup>

**D. Nothing Prevented the Alexander Objectors from Filing a Cross-Petition**

The Alexander Objectors complain that they did not have an opportunity to make a fee submission. That is unpersuasive. Other objectors filed petitions for fees, which are addressed below in Section IV of this omnibus reply memorandum, and which detail the value they allegedly added to the Settlement. *See* ECF Nos. 7070 (Faneca Objectors), 7232 (Armstrong Objectors), 7364 (Jones Objectors). Nothing prevented the Alexander Objectors from doing likewise, especially since they had the example of the Faneca Objectors’ fee petition, which was filed as far back as January 11, 2017.

Telling, however, in their copious 69-page opposition to Class Counsel’s fee petition, the Alexander Objectors do not describe a *single* common benefit task they performed, or a *single* improvement to the Settlement that they brought about through their objections (and no doubt for good reason, for they added no value to the Settlement). Rather, they criticize Co-Lead Class Counsel Seeger, stating that he “secretly” determined who would benefit. But there was no mystery involved. Class Counsel is supposed to assign common benefit work to prevent unnecessary duplication and waste. Court-appointed counsel for a class typically have to determine which lawyers provided a common benefit to the class.

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<sup>13</sup> The remaining arguments should not detain the Court. For example, the Alexander Objectors cite *Dungee v. Davison Design & Development*, No. 16-1486, \_\_ F. App’x \_\_, 2017 WL 65549 (3d Cir. Jan. 6, 2017), “as a great example of a circumstance where lodestar is more appropriate when subjective evaluation would be required to value the fund.” ECF No. 7355, at 22-23. It is nothing of the kind. In fact, *Dungee* is nothing more than an unremarkable example of the use of the lodestar method in a fee-shifting case.

#### **E. The Alexander Objectors' Evidentiary Complaints Are Specious**

When all else fails, nit-pick. And so the Objectors “demand a degree of detail . . . that is not required by law.” *Pawlak v. Greenwalt*, 713 F.2d 972, 978 (3d Cir. 1983). “The court’s focus in assessing the adequacy of submitted documentation,” however, “is whether the documentation permits the court to determine if the claimed fees are reasonable.” *Id.*

The Alexander Objectors devote nearly 13 pages of their brief to sundry “evidentiary objections” to the various declarations in Class Counsel’s opening papers. ECF No. 7355, at 44-57. But this is neither a trial nor a summary judgment motion and this objection begins with the erroneous assumption that the fee cannot be the result of a percentage-of-the-fund award. The lodestar cross-check “does not trump the primary reliance on the percentage of common fund method.” *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005). As the Third Circuit has explained, “[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records. . . . [T]he resulting multiplier need not fall within any pre-defined range, provided that the District Court’s analysis justifies the award.” *Id.* at 306-07 (footnotes and citations omitted). In short, a lodestar cross-check serves merely as a *rough* yardstick to gauge the reasonableness of a common benefit fee request.

Moreover, the objections defy common sense. The declarations submitted in the opening papers were from partners who supervised their respective firms’ participation in this litigation. The suggestion that these attorneys lack personal knowledge of the tasks performed by their respective firms is absurd. Moreover, as detailed in Mr. Seeger’s master declaration, common benefit work was performed, and common benefit expenses incurred, under his aegis,

and he deemed all work being billed reasonable, necessary, and non-duplicative. ECF No. 7152-2, at ¶¶ 72-73, 75-76.

The Alexander Objectors further complain that “[t]he Court needs to know what the attorneys were doing.” ECF No. 7355, at 11. The contention that the Court cannot evaluate how attorneys spent their time on this litigation is puzzling.<sup>14</sup> The Court took an active interest in the settlement negotiations and mediation, with respect to which it was continually apprised of developments by both Mediator Phillips, and by Special Master Golkin, and it has taken an active role in overseeing the Settlement’s implementation. Past filings – *e.g.*, ECF Nos. 5634-4 (Judge Phillips’ Declaration in support of preliminary approval), 6423-3 (Mr. Seeger’s Declaration in support of final approval) – have further informed the Court of Class Counsel’s activity.

Moreover, the various declarations submitted in support of the fee petition are quite sufficient to provide this information. The opening memorandum provides significant detail over 17 pages, with copious citations to the record. Co-Lead Class Counsel Seeger’s master declaration (ECF No. 7151-2) describes, over nearly 18 pages and in significant detail, the unfolding of the litigation and the critical work done in each phase. Declarations submitted by other Class and Subclass Counsel also detail the substantial efforts undertaken to achieve the

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<sup>14</sup> Objector Anderson makes the conclusory argument that too much work was done by senior attorneys and could have been handled by junior attorneys. ECF No. 7370, at 2. This throwaway argument merits little discussion. It is uninformed second-guessing by lawyers who lack insight into how litigation of this magnitude and complexity was prosecuted, managed, and ultimately resolved. Class Counsel’s opening memorandum and Mr. Seeger’s master declaration set forth the complexity of the work undertaken by Class Counsel. For example, the many mediation and negotiation sessions with senior NFL counsel required the involvement and input of seasoned lawyers. Developing multiple experts across several fields also required the involvement of experienced attorneys. This is not a case where senior partners are billing time for having handled document review, and Objector Anderson makes no effort to identify in any way work that could have been done by less-experienced counsel.

outcome here. *See* Declaration of Steven C. Marks (ECF No. 7151-8), at ¶¶ 3-28; Declaration of Gene Locks (ECF No. 7151-7), at ¶¶ 3-18; Declaration of Arnold Levin (ECF No. 7156-6), at ¶ 2a-r. Other supporting declarations similarly provide ample detail. *E.g.*, Declaration of Samuel Issacharoff (ECF No. 7151-18), at ¶ 2; Declaration of Craig Mitnick (ECF No. 7151-23), at ¶ 2(a)-(s). The Alexander Objectors ignore all of this evidence.

Moreover, Mr. Seeger’s master declaration informs the Court of the process followed by Class Counsel, and provides the necessary assurance that the time and expenses were expended for the common benefit of the Class. “Pursuant to the procedures outlined in CMO5, attorneys and staff working at [his] direction and under [his] supervision collected and reviewed submissions of common benefit time and reimbursable costs and expenses submitted by the PEC, PSC and by other firms to which [he] had assigned common benefit work.” ECF No. 7151-2, at ¶ 75. Only time and expenses that inured to the common benefit of the Class, and that advanced the claims resolved in the Settlement, have been included in the time presented, and the costs submitted herein. *Id.* ¶ 76.

#### **F. The Proposed Lodestar Multiplier Is Eminently Reasonable**

Yet another meritless objection is the Alexander Objectors’ contention that a lodestar multiplier is available only in rare and exceptional instances and is unwarranted here. ECF No. 7355, at 33-34. Once again, they inappropriately rely on *Dungee*, which is inapposite for the simple reason that it was a statutory fee-shifting case, not a percentage-of-recovery constructive common fund case such as this. *See Dungee*, 2017 WL 65549, at \*2 (“When a court applies the lodestar method to award fees in a class action case *that involves a fee-shifting statute*, there is ‘a ‘strong presumption’ that the lodestar represents the ‘reasonable’ fee,” for class counsel’s

work.”) (emphasis added).<sup>15</sup> The case law in this Circuit has been eminently clear on the difference between statutory fee-shifting cases and common fund cases. To cite *Dunfee* in this fashion borders on the sanctionable.

The Alexander Objectors take their misguided argument that the Court employ the lodestar method – which is inappropriate in cases that do not involve an application under a fee-shifting statute – further by arguing that “Class Counsel is upwardly enhancing its fee calculations instead of revising them downward as suggested by the Third Circuit.” ECF No. 7355, at 31. The Third Circuit, however, has held that, for lodestar cross-check purposes, a multiplier of 1-4 is appropriate and frequently awarded, *see In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 742; *In re Prudential*, 148 F.3d at 341, although a lodestar multiplier need not fall within any pre-defined range, provided that a district court’s analysis justifies the application of the multiplier, *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 280 (3d Cir. 2009).<sup>16</sup>

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<sup>15</sup> See also, e.g., *Student Pub. Interest Research Grp. of N.J., Inc. v. AT&T Bell Labs*, 842 F.2d 1436 (3d Cir. 1988) (pursuant to Clean Water Act’s fee-shifting provisions); *Pennsylvania v. Del. Valley Citizen’s Counsel for Clean Air*, 478 U.S. 546, 565 (1992) (Clear Air Act case); *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (attorneys’ fees provisions of Solid Waste Disposal Act and Clean Water Act); *Perdue v. Kenny A. ex. Rel. Winn*, 559 U.S. 543, 546 (2010) (42 U.S.C. § 1988) (“This case presents the question whether the calculation of an attorney’s fee, under federal fee-shifting statutes, based on the “lodestar,” *i.e.*, the number of hours worked multiplied by the prevailing hourly rates, may be increased due to superior performance and results.”) (footnote omitted).

<sup>16</sup> The Anderson Objectors posit that “[a] more reasonable average hourly rate for this case would be \$600.” ECF No. 7370, at 3. It is unclear from where this number is drawn because there is no supporting citation for this contention. Class Counsel have demonstrated that their hourly rates are reasonable. At any rate, even using this arbitrarily-selected rate, the lodestar multiplier would come to 3.56 – still within the 1-4 range that the Third Circuit has endorsed.



### **G. The “Mega-Fund” or Declining Percentage Theory Should Not Apply Here**

The Alexander Objectors point to the “declining percentage” (also known as “mega-fund”) theory discussed in *Cendant Corp. PRIDES Litigation*, and urge the Court to apply it here. ECF No. 7355, at 31. They misrepresent, though, the Third Circuit’s position on this theory. Although “it may be appropriate for percentage fees awarded in large recovery cases to be smaller in percentage terms than those with smaller recoveries[,] . . . the declining percentage concept does not trump the fact-intensive *Prudential/Gunter* analysis.”<sup>17</sup> *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d at 302-03. Indeed, “there is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund,” *id.*, and decisions from this Court have rejected it.<sup>18</sup>

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<sup>17</sup> The Alexander Objectors argue that this Settlement was insufficiently complex for the Court to consider the *Gunter/Prudential* factor of “Complexity and Duration of the Litigation” as favorable to Class Counsel’s fee petition. ECF No. 7355, at 35-36. That argument is also without merit. As Class Counsel described, the scope of the relief provided by the Settlement, the multiple challenging legal hurdles faced, the sophistication of the Defendants and their counsel, and the complicated medical and actuarial issues, among other factors, made this Settlement quite complex. *E.g.*, ECF No. 7151-1, at 37-43. The Alexander Objectors maintain that after the Court ordered the parties to mediation, “no further merits litigation occurred after that point.” ECF No. 7355, at 36. That is patently false because it disregards the extensive briefing of motions for preliminary and final approval (the former a second time, after the Court rejected the first proposed settlement), spirited opposition to both preliminary and final approval, attempted interlocutory appellate review of this Court’s preliminary approval order, the Fairness Hearing and post-hearing briefing, and the long appeals process that ensued afterwards (and in which the Alexander Objectors themselves took part).

<sup>18</sup> *E.g.*, *In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at \*16-17 (E.D. Pa. June 2, 2004) (“The Court rejects [the sliding scale] in this case because the highly favorable settlement was attributable to the petitioners’ skill and it is inappropriate to penalize them for their success. Moreover, the sliding scale approach is economically unsound.”); *In re Ikon Office Solutions, Inc., Secs. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (mega-fund approach “fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery”).

But even under this “mega-fund” approach, an award of approximately nine percent of value of the recovery is still well within the norm in this Circuit for class counsel fees in cases involving recoveries that exceed \$100 million.<sup>19</sup> *E.g.*, *King Drug Co. of Florence v. Cephalon*, No. 06-cv-01797-MSP, 2015 WL 12843830, at \*5 (E.D. Pa. Oct. 15, 2015) (awarding 27.5% of \$512 million settlement); *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (25% of \$126,641,315 fund). It is also within the norm of awards made by courts outside this Circuit.<sup>20</sup> *E.g.*, *Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc.*, No. 02-C05893, ECF No. 2265, at 1-2 (N.D. Ill. Nov. 10, 2016) (awarding 24.68% of \$1.575 billion settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at \*7 (N.D. Cal. Apr. 3, 2013) (28.5% of \$1.1 billion fund); *In re Tyco Int’l, Ltd. Multidist. Litig.*, 535 F. Supp. 2d 249, 266, 272, 274 (D.N.H. 2007) (14.5% of \$3.3 billion fund); *In re Adelphia Commc’ns Corp. Sec. and Derivative Litig.*, No. 03 MDL 1529, 2006 WL 3378705, at \*1, \*3 (S.D.N.Y. Nov. 16, 2006) (awarding 21.4% of \$455 million fund); *In re Freddie Mac Sec. Litig.*, No. 03-CV-4261 (JES), slip op. at 1 (S.D.N.Y. Oct. 27, 2006) (20% of \$410 million fund); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 387 (D. Md. 2006) (12% of \$1.1 billion fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1192 (S.D. Fla.

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<sup>19</sup> The Alexander Objectors cite *In re Prudential* for the proposition that a fee representing 6.7 percent of the recovery is excessive. ECF No. 7355, at 29-30. *In re Prudential*, however, was decided in 1998. The Alexander Objectors fail to address the nearly two decades of intervening caselaw cited by Class Counsel, as well as Professor Fitzpatrick’s empirical study, which show that Plaintiffs’ 9% request is well within the range approved by courts. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (copy annexed to Seeger Decl. as Ex. Y (ECF No. 7151-28)).

<sup>20</sup> The Alexander Objectors maintain that Class Counsel’s comparison of the fee award requested here to that of other cases is “legally infirm” because Class Counsel discussed smaller settlements. ECF No. 7355, at 30. That ignores the discussion of this issue in Class Counsel’s opening memorandum. *See* ECF No. 7151-1, at 44-47 & n.31. The award requested by Class Counsel falls comfortably within the parameters of fee awards in large class settlements.

2006) (31.33% of \$1.1. billion fund); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) (15% of \$1-1.1 billion award); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 485-86 (S.D.N.Y. 1998) (14% of \$1.027 billion fund).<sup>21</sup>

### **III. THE REQUESTED FIVE PERCENT SET-ASIDE IS APPROPRIATE AND NECESSARY TO COMPENSATE COUNSEL WHO PERFORM COMMON BENEFIT WORK RELATED TO SETTLEMENT IMPLEMENTATION OVER THE SETTLEMENT'S 65-YEAR TERM**

#### **A. Creation of the Separate 5% Set-Aside Fund**

At this juncture, Class Counsel are not asking to be paid for any post-Effective Date work, despite some objectors' attempts to mischaracterize the set-aside request.<sup>22</sup> Rather, Class

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<sup>21</sup> The Alexander Objectors argue that Class Counsel cannot rely on the value of benefits attributable to the efforts of others as a favorable *Gunther/Prudential* factor. They assert that Class Counsel derived "important fruits" from the congressional hearings on head injuries in the NFL. ECF No. 7355, at 36-37. That argument fails to address the caselaw cited by Class Counsel regarding the level to which government assistance must have risen in order to adversely impact a fee petition. *See* ECF No. 7151-1, at 47-48. Government assistance or the benefits that class counsel drew from a government investigation or other legal action must be significant. Any benefit that Class Counsel derived from the congressional hearings falls well short of that level. The Alexander Objectors contend that "Class Counsel supplies no evidence" that "this litigation was not aided by the government investigation." ECF No. 7355, at 37. To the contrary, Mr. Seeger's Declaration lays out in very comprehensive detail how Class Counsel developed their case.

<sup>22</sup> Several objectors describe their objections as being in response to Class Counsel's alleged request for an additional \$47.5 million fee, which they calculate by multiplying 5% by the estimated \$950 million value of the MAF. *See* ECF No. 7355 (Alexander Objectors), at 58; ECF No. 7355-1 (McCoin Decl.), at ¶7 (suggesting that the 5% set-aside is tantamount to "an additional fee request of \$45,470,000, or \$25.9 million discounted to present value."); ECF No. 7360 (Hilgenberg and Duranko), at 5 ("Class Counsel's request would result in a \$47,500,000 holdback against the individual class members and, given the stage of these proceedings, that amount can hardly be justified."). *See also* ECF No. 7346 (Top NFL Lawyers), at 5 (claiming that Class Counsel is attempting "to collect (with this first Petition for a set-aside) all of the money it claims is necessary to fund the common benefit costs for the entire 65-year life of the Settlement"); ECF No. 7370 (Objector Anderson), at ¶ 6 (referring to Class Counsel's alleged "attempt to collect all of the money purportedly necessary to fund the common benefit costs for the Settlement's 65-year life expectancy[.]"). Objectors absurdly assume that all of these set-aside monies will be paid to the currently appointed Class Counsel. That is plainly not the case. These monies will be paid out over time for the Settlement's 65-year life, as further described in

(Footnote continued . . .)

Counsel are asking the Court to acknowledge that it is fair, reasonable, and necessary to compensate counsel for common benefit work performed after the Settlement's Effective Date, and to direct that the post-Effective Date common benefit work compensation be funded through set-asides from Class Members' individual Monetary Awards and Derivative Claimant Awards. As noted in the leading treatise on class actions, it "is evident [that] a court makes two distinct calculations in assessing common benefit fees: *first*, a holdback assessment, and *second*, an award assessment." 5 William B. Rubenstein, Alba Conte, and Herbert Newberg, *Newberg on Class Actions* ("Newberg"), § 15:116, at 432 (5th ed. 2015) (emphasis in original). Presently, Co-Lead Class Counsel request that the Court perform only the first calculation and order the holdbacks or set-asides.

Assuming that the Court permits its creation, the separate set-aside fund ("Set-Aside Fund") would be a pool of funds distinct from the Attorneys' Fees Qualified Settlement Fund funded by the NFL, *see* Settlement Agreement §§ 21.2 & 23.7 (ECF No. 6481-1), at 82, 90; ECF No. 7246 (Mar. 7, 2017) (Order establishing Attorneys' Fees Qualified Settlement Fund and appointing Garretson Resolution Group, Inc. as Fund Administrator), and will be funded gradually as claims are paid over the 65-year life of the Settlement, and it will be overseen by the Court on an ongoing basis. Over time, petitions will be filed by counsel performing post-Effective Date common benefit work, seeking reimbursement for fees and expenses, and the Court will consider the petitions and rule upon them accordingly. *See* Section III.B, *infra* (discussing anticipated petitions). While Class Counsel expect that they will seek reimbursement for fees and expenses related to common benefit work performed by Court-appointed Class Counsel after the Effective Date, it is not solely their own compensation that is at issue.

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Section III below, and thus to generations of attorneys performing work on behalf of the Class long after Co-Lead Class Counsel are gone from the scene.



Assuming the Court agrees that the creation of a Set-Aside Fund is necessary to provide compensation and incentive related to post-Effective Date common benefit work, the percentage of the holdback should be set now, before the Claims Administrator pays out the first monetary awards to Class Members and Derivative Claimants. Determination of a set-aside amount now will allow the Claims Administrator to hold back these amounts from the awards and place them in the Set-Aside Fund.

Certain objectors contend that the request for a set-aside is premature because the post-Effective Date costs are not yet known. *See* ECF No. 7370 (Objector Anderson), at ¶ 6 (“the request is premature because the true administrative costs are not yet known”). As noted in Class Counsel’s opening papers, and as set forth again below in Section III.C, Class Counsel know and are able to enumerate the types of common benefit work that most certainly lie ahead (some of which already have been accomplished) to be performed by current Class Counsel and in the future by those lawyers who will take over these responsibilities. Thus, as detailed further below, Class Counsel expect that as the claims and common benefit work proceeds, historical data and perspective will be developed, and the lodestar and expense investment required for common benefit work on a monthly or annual basis can be forecast. But, clearly, if the Court agrees that post-Effective Date common benefit work should be compensated via a Set-Aside Fund, the set-aside must be in place before any Claims are paid. The request is not premature. Further, consistent with the Settlement Agreement and other cases, a 5% set-aside on monetary

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“will necessarily . . . rely on individual representation to ensure the most successful result possible for individual claimants”); *see also* ECF No. 7346 (Top NFL Lawyers), at 6-8. If so, then the Court may adjust the compensation in the future. Some parts of settlement administration, such as selection of Qualified MAF Physicians over time, cannot be performed by individually retained counsel. At this point, however, the sole issue is the creation of a fund from which compensation can be awarded, as necessary.



awards is reasonable to ensure that this compensation and incentive is provided going forward.<sup>25</sup> Obviously, the Court can reevaluate the set-aside at any point.

Unsurprisingly, several individually-retained lawyers, who have not performed any common benefit work in the past (and who likely will not perform any common benefit work in the future), have objected to the 5% set-aside. These objecting counsel know that for represented Class Members, as per the Settlement Agreement, any set-aside from a Monetary Award or Derivative Claimant Award will reduce the attorney's fee payable to that counsel by the amount of the set-aside. Settlement Agreement § 21.1 (ECF No. 6481-1), at 82. With very few exceptions, though, the objections to the 5% set-aside were filed by lawyers who did not acknowledge the fact that the 5% set-aside will come out of the lawyers' contingent fee portion,<sup>26</sup> rather than out of the Class Member's share. *E.g.*, ECF No. 7364-1 (Jones Objectors)

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<sup>25</sup> Although some authorities consider the initial calculation of a holdback amount to be “purely arbitrary in nature,” 5 *Newberg* § 15:116, at 432, that is because a holdback percentage is often adopted at an early stage in multidistrict cases, before settlements have been reached. Similarly, the cases cited by Class Counsel in their opening papers for the proposition that a 5% set-aside is reasonable were in such a posture. *See* ECF No. 7151-1, at 71 n.38. Neurocognitive Football Lawyers criticize Co-Lead Class Counsel for relying upon these cases. *See* ECF No. 7350, at 1-2. This Settlement's 65-year lifespan is so unique, however, that there are really no other cases in exact parallel. Nevertheless, it is helpful to highlight other cases wherein percentage set-asides in and around 5% were established. *But see In re Diet Drugs*, 582 F.3d 524, 533 (3d Cir. 2009) (noting that common benefit fees were awarded first in an interim fee award and then later in a final fee award). *See also* Section III.D, *infra* (further response to Neurocognitive Football Lawyers' argument that it is inappropriate to compensate Class Counsel for common benefit work done prior to and after Settlement's Effective Date).

<sup>26</sup> One of the exceptions, Top NFL Lawyers, acknowledged that the 5% holdback would come out of the individually retained attorneys' fees. *See* ECF No. 7346. Top NFL Lawyers assumed that lawyers are not yet individually retained and would be “increase[ing] the cost of their service by between 20-50% in most cases to their future clients,” should the 5% set-aside be ordered. *Id.* at 10. These Objectors also suggested that the set-aside might cause individually retained lawyers “to reduce the time and effort on each individual claim to make up for the dramatically lower, projected revenues even a 2% set aside would cause. This is due to the simple economics of the business of a law practice.” *Id.* One hopes that the market, and an

(Footnote continued . . .)

at 9 (“The Jones Objectors do not believe taxing the benefits payable to retired players or their families is either appropriate or necessary, particularly in light of the very large and fully funded Attorneys’ Fees Qualified Settlement Fund.”). These counsel simply ignore the fact that it is they, and not their clients, who will have their compensation reduced by the set-aside.<sup>27</sup>

**B. Future Petitions for Awards to Reimburse Counsel for Post-Effective Date Common Benefit Work from the Set-Aside Fund**

Assuming that the Court determines that a Set-Aside Fund to pay for post-Effective Date common benefit work ought to be created and adopts the proposed 5% holdback, at some point in the future Class Counsel will be petitioning (at appropriate intervals) the Court for awards of fees and expenses from that fund. Of course, before doing so, as noted in Co-Lead Class Counsel’s opening papers, “Plaintiffs’ counsel will submit, within thirty days of the Court’s Order, a detailed plan of administration, including how the funds created from the holdbacks will be pooled and maintained, and how any attorney will apply for compensation for post-Settlement work performed.” ECF No. 7151-1, at 64. Class Counsel expect that it will be about twelve months before they will file such a petition, consistent with the aforementioned plan of administration or whatever plan of administration the Court determines is appropriate.

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abiding sense of ethics, will keep lawyers not yet retained from hiking their rates for work that, at this point, bears no contingency risk.

<sup>27</sup> The only lawyers objecting to the 5% set-aside who have represented to this Court that they are not taking a contingent fee are the attorneys from Polsinelli PC, who represent Kevin Turner’s estate against Podhurst Orseck P.A. ECF No. 7029, at ¶ 2 (noting they are representing the estate of Kevin Turner on a pro bono basis). Additionally, one pro se Class Member, Ronald Sabal, filed an objection to the holdback. ECF No. 7351. The impact of the requested set-aside upon a Class Member’s portion of a monetary award is addressed in Section III.E, *infra*.



Accordingly, any ruling on the reasonableness of the amount or the timing of future compensation requests is not ripe.<sup>28</sup>

**C. Post-Effective Date Common Benefit Work and Expenses to Be Covered by the Set-Aside Fund**

At bottom, the objections to a common benefit set-aside reflect lack of knowledge of what is involved in this complex Settlement, largely due to the fact that most objecting counsel have done nothing on the case. None of these lawyers has lifted a finger to aid in the launch and the maintenance over time of the Claims Administration program, the BAP, and the Lien Resolution Program.<sup>29</sup> Nevertheless, because several objectors demand more detail, it is provided below.

As an initial matter, it should be noted that each one of the below tasks involved coordination between many varying parties through ongoing conference calls, meetings and emails, between Co-Lead Class Counsel, counsel for the NFL Parties, the Claims Administration team, the BAP Administration team, the Lien Resolution Administration team, and the Special Masters. Each of the below tasks that involved the drafting of a document included multiple

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<sup>28</sup> Many objectors seem to think that the detail that will be provided when these petitions are filed needs to be furnished now. *See* ECF No. 7350 (Neurocognitive Football Lawyers), at 11; ECF No. 7373 (Merriweather Objectors), at 4-5. That is not the case. The Neurocognitive Football Lawyers even suggest that there should be discovery. ECF No. 7350, at 4, 8, 12. Such a suggestion would invite the kind of “second major litigation” that the Supreme Court has counseled against in fee application matters. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

<sup>29</sup> Class Counsel endeavor herein to state in painstaking detail the post-Effective Date common benefit work already completed and to be accomplished in the future because some objectors claim to not understand how the common benefit work performed and to be performed post-Effective Date that would be paid for by distributions over time from the proposed Set-Aside Fund, is distinct from the common benefit work (and the corresponding expenses) that was completed prior to the Effective Date, for which compensation is being sought from the \$112.5 million paid by the NFL Parties. *See* ECF No. 7282 (Blizzard Objectors), at 6 (asserting that Class Counsel have not shown how the pre-Effective Date labor is different from the post-Effective Date labor).

By way of example and based upon the limited data available thus far, in the first quarter of 2017 alone, Seeger Weiss LLP already has invested over \$600,000 in lodestar devoted to the below-described tasks. *See* Seeger Supp. Decl., at ¶ 15. Two high-level lawyers at Seeger Weiss, including a partner, have been working virtually full-time, and another lawyer as well as a paralegal have been working part-time on these common benefit implementation-related tasks since even before the January 7, 2017 Effective Date. *Id.* The work that they, Co-Lead Class Counsel, and other Class Counsel firms have been doing (and will do in the future) is set forth in paragraphs 14 to 38 of the accompanying Seeger Supplemental Declaration, and enumerated below. It captures only the major tasks that have been undertaken and can be anticipated to launch and maintain the Settlement Program

Class Counsel recognized, as did the Court, the importance of ensuring that all Class Members received clear and concise notice of the Effective Date for the Settlement and the need to register by August 7, 2017. To maximize participation, Class Counsel drafted and had the Claims Administrator disseminate via mail, email, and on the Settlement Website, the Pre-Registration Notice, and once the Registration opened on February 6, 2017, the formal

Supplemental Notice advising that Registration was open was drafted and disseminated. In addition, Class Counsel is engaged in ongoing efforts, including further mailings, to inform Class Members of the need for registration to enjoy the benefits of the Settlement, and the ease with which registration can be accomplished.

## 2. Implementation Paperwork and Retention of Key Officers

Class Counsel expended efforts to retain the administrators and Special Masters, conferring with them and with counsel for the NFL Parties to execute all necessary documentation for formal retention as well as developing documents that establish the fundamental operation of each of the Administrators, including Conflict of Interest plans and operational procedures. Similarly, Class Counsel worked expeditiously to retain the Settlement Trustee and execute all necessary documentation to ensure that the Settlement Trust was established and would continue funding Settlement Benefits throughout the 65-year term of the Settlement. In addition, Class Counsel have worked quickly with counsel for the NFL Parties, the Administrators, and the Special Masters to ensure that all forms required for the various medical providers were created in time to review the documents and vet the medical providers so as to have selections of providers agreed to by the Settling Parties well in advance of the dates of launch of the BAP and MAF.

## 3. Work to Ensure Class Member-Friendly Registration and Claims Processes

As registration is the door through which each and every Class Member must pass before he/she can enjoy the benefits of the Settlement, Class Counsel dedicated many hundreds of hours with the Claims Administrator, the NFL Parties, and the Special Masters to the negotiation and development of the registration forms and procedures to ensure that the process was efficient and accessible so that no eligible Class Member would be denied entry. Besides the creation of the

hard-copy forms, Class Counsel worked alongside the other parties to launch the on-line registration portal that can be used by Class Members to complete registration in a matter of minutes. Underlying the registration process are hundreds of pages of procedures and other guidance documents that were created through the collaborative process discussed above.

In this respect, Class Counsel have worked and will continue to work with the Claims Administrator to continually update the Settlement Website, including its “Frequently Asked Questions” section. This work was particularly demanding during several watershed moments in the Settlement’s life thus far, including the passage of the Effective Date, the launch of Registration, and the commencement of the period to file claims. This platform is particularly valuable to ensuring that Class Members have easy access to the most up-to-date information and clear guidance on the Settlement Program. Class Counsel continue to work on revisions to the Settlement Website as new phases begin and additional forms and other documents become available for the Class Members, such as those relating to the BAP Program and the appeals process. Additionally, Class Counsel worked with the Claims Administrator to assist in the transition of the handling of Class Member calls from the Call Center to the Claims Administrator, once the Effective Date was triggered.

Moreover, Class Counsel worked with counsel for the NFL Parties, the Administrators, and the Special Masters to ensure that all forms needed to submit a claim were prepared, and that they were all-inclusive and easily understood. These forms covered not only the basic claim form, but also the supporting forms that need to be submitted to perfect a claim, including all of the Diagnosing Physician Certification Forms, beginning with the Pre-Effective Date Diagnosing Physician Certification Form, so that the claims by those Class Members who received Qualifying Diagnoses prior to the Effective Date can be processed as quickly as possible.

Additionally, Class Counsel worked with the Claims Administrator, the NFL Parties and the Special Masters to launch an on-line claims portal, where Class Members are guided through the claims submission process. Underlying the entire claims process are hundreds of pages of procedures and other guidance documents that were created through the collaborative process discussed above.

4. Efforts to Widely Spread Information to Class Members

As requested by the Court, and as part of its wider efforts to reach out to the Class about the Settlement Program, Co-Lead Class Counsel prepared a presentation for Class Members for the February 8, 2017 status conference (which the Court convened to address the status of the Settlement's implementation) and arranged for the conference to be live-streamed on the internet. The presentation was designed to explain to Class Members watching and listening to the internet broadcast the next steps they needed to take, to inform them of the efforts being expended by all involved to get the Settlement programs up and running, to answer questions, and most of all to encourage registration. In addition, Co-Lead Class Counsel also has held several webinars to speak to Class Members through the internet, to encourage registration and to answer questions about the Settlement, its benefits and how to obtain the benefits. These webinars, like the wider outreach efforts, will be ongoing. It appears that these efforts to encourage registration are bearing fruit and are likely to result in a participation rate that is higher than had been projected. *See* Seeger Supp. Decl., Ex. JJ, at 6 (Dr. Vasquez' original projection for the participation rate of 59% has now increased to 63%, based upon the registration rates for the first eight weeks of the registration period).

5. Efforts to Combat the Dissemination of Misinformation to Class Members

Conversely, Class Counsel have had to battle the spreading of *misinformation* to Class Members. Class Counsel have received numerous reports of written and oral communications with Class Members, containing inaccurate or misleading information about the Settlement, by those seeking to profit from Class Members by charging fees or securing portions of Class Members' anticipated monetary awards. In furtherance of their fiduciary duty, Class Counsel have made every effort to investigate these reports and, where warranted, bring matters to the Court's attention in order to protect Class Members. *See* ECF Nos. 7175, 7347 (motions to enjoin improper communications and solicitations of Class Members).

6. Selection of Advisory Panel Members and Appeals Advisory Panel Consultants

The Appeals Advisory Panel is a panel of physicians, composed of, in any combination, five board-certified neurologists, board-certified neurosurgeons, or other board-certified neuro-specialist physicians, and the Appeals Advisory Panel Consultants is composed of three neuropsychologists. It was not easy to agree with the counsel for the NFL Parties upon these eight individuals to recommend to the Court for appointment, but Co-Lead Class Counsel worked tirelessly for months so that the April 7, 2017 deadline was met. These physicians will be advising the Special Masters and the Court. *See* Settlement Agreement § 2.1(g)-(h), 5.13, 6.4, 9.8 (ECF No. 6481-1), at 9, 34, 37-38, 52. Most immediately, however, these physicians will be reviewing certain claims where the diagnoses were made prior to the Effective Date to determine whether they are satisfactory Qualifying Diagnoses under the Settlement and will, in some instances, resolve disputes between BAP Providers as to the existence (or not) of a Qualifying Diagnosis.

7. Selection and Orientation of Hundreds of Individuals to Serve as Qualified BAP Providers and Qualified MAF Physicians and Maintenance of These Physician Networks

The time-consuming vetting process associated with the selection of those who will serve as Qualified BAP Providers and Qualified MAF Physicians has led to the initial launch of the MAF network and preliminary establishment of the BAP Provider network while Class Counsel and the other relevant parties continue to recruit and contract with additional physicians and providers. Class Counsel have been participating in this work on virtually a daily basis since the Effective Date and fully expect that the BAP Administrator will remain on track to begin scheduling BAP examinations as of May 7, 2017, with the BAP opening on June 6, 2017. On April 7, 2017, the list of Qualified MAF Physicians who are authorized to make post-Effective Date Qualifying Diagnoses was made available on the Settlement Website. These were daunting tasks, but they have been accomplished.

Working with the BAP Administrator, the Claims Administrator, the NFL Parties and its own experts, Class Counsel have developed the services agreement that each physician and provider will need to sign to serve in the networks. Through this same process, the parties have prepared the manuals that will be used by each of the administrators to train the physicians and providers on the medical aspects of the settlement, including the testing regimen at the heart of the BAP Program and what constitutes a Qualifying Diagnosis for the MAF.

Maintaining these networks over the life of the Settlement will require the same kind of engagement in recruiting new physicians and providers as the Settlement, like the Retired NFL Players and the original physicians and providers, age.

Moreover, Class Counsel will be actively monitoring and reviewing of these networks to ensure that the Retired NFL Football Players are receiving the care and services that they deserve under the Settlement.

8. Participation on Class Members' Behalf in the Appeals Process

Given the Settlement's 65-year term and the volume of claims that will be submitted, appeals of Monetary and Derivative Claimant Award determinations will inevitably be filed, be they disputes of benefit denials or about the amount of an award, and there will likely be appeals of registration denials as well. Besides Class Members themselves, Co-Lead Class Counsel have standing under the Settlement to appeal monetary award determinations. Settlement Agreement § 9.5 (ECF No. 6481-1), at 51. Class Counsel will be called upon to provide assistance to unrepresented Class Members and to represented Class Members' individually-retained counsel. Because Class Counsel will gain experience in the appeal process over time, their assistance will be essential to Class Members who will face counsel for the NFL Parties on the opposing side. Co-Lead Class Counsel also have the authority to make formal submissions in support of appeals taken by Class Members. Settlement § 9.7(c) (ECF No. 6481-1), at 52. As with their authority to file appeals, exercise of this authority will help to establish a decisional body that will facilitate the delivery of benefits to the Class. Conversely, Co-Lead Class Counsel also have the authority to oppose appeals of awards made to Class Members that the NFL Parties may take, which is as important to protecting the rights of Class Members as the appeals taken on their behalf.



9. Monitoring the NFL Parties' Funding of and Targeted Reserves for the Settlement

Class Counsel must continue to monitor the funds and insure that the NFL Parties comply with the funding and maintenance of targeted reserves for the MAF and BAP, as well as monitoring the Settlement Trust and the Trustee, under Article 23 of the Settlement.

10. Establishing Procedures for and Participation in Periodic Audits of All Aspects of the Program, Including Medical Providers and Administrators

As with any program of this magnitude and duration, auditing procedures will need to be established to insure that all work done by the various parties engaged in the Settlement Program for the benefit of the Class Members is being done with efficiency and professionalism. The sheer scope of the activities and participants, including each member of the physician networks, will demand significant time to perform the auditing functions. Because it is anticipated that the NFL Parties will be engaging in such audits, it is important also to have Class Counsel involved.

11. Replacing the Qualified BAP Providers and Qualified MAF Physicians, Appeals Advisory Panel Members, and Appeals Advisory Panel Consultants

Inevitably, in light of the Settlement's 65-year term, physicians who have been selected to serve in the various roles will need to be replaced, whether for reasons of retirement, disability, death, or simply because they decide they no longer wish to participate in the Settlement Program. The vetting and selection of replacement physicians is common benefit work that will need to be repeated hundreds of times over the 65-year life of the Settlement. Class Counsel already have gained experience in this process, which will allow physicians to be replaced quickly as they exit the Program.

12. Revisiting of the Science Every Ten Years

The Settlement requires that the Settling Parties revisit the science every ten years to discuss in good faith the possible prospective modifications to the definitions of the Qualifying

Diagnoses or the protocols for making Qualifying Diagnoses (or both), in light of generally accepted advances in medical science. Settlement Agreement § 6.6 (ECF No. 6481-1), at 35. Necessarily, this will require Class Counsel to independently consult with medical and scientific experts to keep abreast of developments in these areas over time.

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In light of all of the common benefit work that already has been done post-Effective Date and that will undeniably need to be accomplished in the future, it is eminently reasonable to establish the Set-Aside Fund now.

**D. Certain Objectors’ Suggestion That the Attorneys’ Fees Qualified Settlement Fund Is Sufficient to Compensate Counsel for All Post-Effective Date Common Benefit Work**

Certain objectors maintain that the \$112.5 million<sup>30</sup> that the NFL Parties agreed to pay to Class Counsel for common benefit work performed prior to the Effective Date should also cover the fees and expenses for the common benefit work that has been and will be performed since the Effective Date. *E.g.*, ECF No. 7161 (Objector Miller), at 7 (claiming that the \$112.5 million is “more than sufficient . . . to cover all reasonable fees that Class Counsel may incur, whether for

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<sup>30</sup> Some objectors improperly inflate the Class Counsel’s potential compensation from funds paid by the NFL Parties to \$128.5 million by disingenuously adding the Notice Costs and Administrative Costs to be paid by the NFL Parties to the \$112.5 million for Class Counsel compensation funded by the NFL. *See* ECF No. 7282 (Blizzard Objectors), at 2, 5-6; ECF No. 7344 (55 Players), at 3, 5. They likely do this so that they can represent that the total amount potentially to be paid to Class Counsel for pre-Effective Date common benefit work represents a higher multiplier of their lodestar than the 2.6 multiplier represented in Class Counsel’s opening papers. ECF No. 7151-1, at 67. Notice Costs and Administrative Costs, however, are plainly not part of the compensation to Class Counsel for common benefit work. The benefit of those costs being separately paid by the NFL Parties (a benefit that Class Counsel negotiated) inures to the benefit of *Class Members*, who would otherwise be taxed with such costs from the recovery. *E.g.*, *In re Penn Cent. Secs. Litig.*, 560 F.2d 1138, 1146 (3d Cir. 1977) (unless class plaintiffs bargain with defendants to pay costs of notice, proper to assess cost against settlement fund); *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1162 (9th Cir. 2013) (settlement fund proceeds would be distributed to class members after costs of settlement administration were deducted). It clearly does not inure to *Class Counsel’s* benefit.

common benefit work, or for clerical work on their individual client's claims, for the next 65 years"); ECF No. 7350 (Neurocognitive Football Lawyers, PLLC), at 2 (taking issue with the fact that this case involves an "immediate and fully paid defined fee benefit and a subsequent substantial fee set aside") Such a suggestion is not realistic, reasonable, or fair.

The pre-Effective Date common benefit work was very different than, and thus should be compensated differently and separately from, the post-Effective Date common benefit work. *See* Section III.C, *supra* (detailed description of post-Effective Date common benefit work). Any comparison by objectors to cases in which post-effective date "common benefit work" consisted of a mere hand-off to a claims administrator are inapposite. As described above, Class Counsel will necessarily play a very active role and there will be vital and time-consuming work to be done for the next 65 years to keep the Settlement Program functioning

Class Counsel's opening papers and the foregoing discussion provide ample justification for the Court's award of the \$112.5 million in fees and expenses that the NFL Parties will pay related to common benefit work performed and expenses incurred prior to the Effective Date. The lodestar and expenses submitted in support of the requested \$112.5 million common benefit fee and expense award were through December 28, 2016 only. *See* Seeger Decl., dated Feb. 13, 2017 (ECF No. 7151-2), at Addenda 1-2 and Exs. C-X. Therefore, the only fees and expenses that will be used as the bases for petitions for reimbursement from the Set-Aside Fund in the future will be expenses incurred and work performed after December 28, 2016. There is simply no danger of "double-dipping."

**E. Certain Objectors' Suggestion That They Should Not Have to Pay for Post-Effective Date Common Benefit Work at All**

Class Counsel recognize that for unrepresented Class Members and for those Class Members whose individually-retained counsel have elected to waive their contingent fees, the

5% set-aside will come out of the Class Member's share. It is nonetheless fair, however, that they too contribute to the post-Effective common benefit work being done to benefit the Class.

Those who already have Qualifying Diagnoses contend that they have not reaped and will not reap the benefit of any common benefit work done after the Effective Date. *See, e.g.*, ECF No. 7351 (Objector Sabal), at ¶¶ 7-9 (pro se Class Member with alleged Alzheimer's diagnosis asserting that post-Effective Date work does not benefit him); ECF No. 7205 (Turner), at 5 (claiming no further work required for Turner's claim to be paid); ECF No. 7360 (Hilgenberg and Duranko Estates), at 5 (estates of deceased Retired NFL Football Players who take issue with holdback because they purport to have obtained ALS diagnoses prior to their deaths). That is not true. Without the common benefit work performed to facilitate registration and claims processing, as well as the establishment of the Appeals Advisory Panel, even those with a diagnosis obtained prior to the Effective Date could not reap the Settlement's benefits. Indeed, the Appeals Advisory Panel must evaluate such diagnoses in order to determine whether they are truly Qualifying Diagnoses in accordance with the Settlement. Furthermore, the contention of a lack of benefit to these Class Members presupposes that they will not need to avail themselves of the appeals process, which would involve additional common benefit work.

Finally, the concept that those who purportedly already have Qualifying Diagnoses (a fact not established until the Appeals Advisory Panel declares the diagnosis as such) should not have to contribute towards the future operation of the Settlement ignores the concept and construct of a class action settlement, particularly this one. The NFL Parties wanted global peace, both as to those who already manifested a neurocognitive or neuromuscular impairment and those who had not. Without the resolution of Subclass 1 claims, there would have been no settlement. The need to resolve the claims of those Class Members in Subclass 1 (*i.e.*, those

Class Members without a Qualifying Diagnosis prior to the Preliminary Approval date) required a program to address them. Thus, it is fair that all Class Members contribute their fair share towards the common benefit work required to implement and maintain a Settlement that provides benefits to the members of both Subclasses.

#### **IV. THE THREE OBJECTOR PETITIONS FOR ATTORNEY'S FEES**

##### **A. The High Standards for Awarding Fees to Objectors**

There is something outlandish about parties who fought to scuttle the Settlement now asking to be paid for acting *to the detriment of the Class*. These objectors delayed compensation to the Class by objecting in this Court, appealing, seeking en banc review, and seeking *certiorari*. The key to an award of attorneys' fees is that the lawyers delivered benefit to the class. Here, these attorneys hurt Class Members. If they truly believe that they had improved the deal, then they should have supported it on appeal. But they objected and lost. In the words of an old pop song, "Did you ever have to make up your mind? And pick up on one and leave the other behind?" Objectors should get nothing.

Not surprisingly, there is no body of law supporting money for losing objectors, though they are often found reaching, palms outstretched. Objectors to a class action settlement are "not generally entitled to an award of counsel fees." *McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626, 658 (E.D. Pa. 2015) ("[C]ourts rarely award attorneys' fees to objectors."), *appeals dismissed*, Nos. 15-1456 (3d Cir. June 12, 2015), 15-1532 (Oct. 29, 2015), 15-1455 (Nov. 2, 2015); *accord id.* at 661 ("[C]ourts rarely award attorneys' fees to objectors."); *Newman v. Stein*, 58 F.R.D. 540, 543-44 (S.D.N.Y. 1973) ("[C]ounsel fees for an objector's counsel when the objections are overruled are granted only in exceptional circumstances.").

The limited exception is that objectors may be “entitled to compensation for attorneys’ fees and expenses *if* the settlement was improved as a result of their efforts.” *McDonough*, 80 F. Supp. 3d at 658 (emphasis added); *accord id.* at 660 n.35 (“District courts within the Circuit have generally considered the value added to the settlement, if any, by the objectors.”) (citing cases); *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 395 (D.N.J. 2012) (“[O]bjectors must have economically benefitted the class or, at the very least, shown that a court adopted their objection.”), *aff’d*, 558 F. App’x 191 (3d Cir. 2014).

The burden is on the objector to so demonstrate. *Faught v. Am. Home Shield Corp.*, 444 F. App’x 445, 446 (11th Cir. 2011); *see In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at \*15 (N.D. Cal. Apr. 3, 2013) (objector “ha[d] not met her burden in establishing that she conferred a substantial benefit to the class”), *appeal dismissed*, No. 13-16216 (9th Cir. June 12, 2014); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. 1203, 2002 WL 32154197, at \*15 (E.D. Pa. Oct. 3, 2002) (objectors’ counsel not entitled to fee award where they “failed to show that their supplemental objections actually conferred a benefit on the settlement class”). The objector must offer specific proof as to “what its efforts were, how they created a benefit, and why that benefit would not have been created absent its efforts.” *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 200 (3d Cir. 2005).

The Third Circuit has noted that district courts enjoy “broad discretion” in determining whether objectors should be awarded fees. *In re Cendant Corp. Sec. Litig.*, 404 F.3d at 201 n.17; *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 743 (3d Cir. 2001). Because an objector “makes his objection to the court, rather than merely negotiating with lead counsel, the court can easily evaluate not only the quality of the objector’s work but also the impact it had on the

court's ultimate decision," and it is thus "able to measure the dollar value of the objector's contribution to the class's net recovery." *In re Cendant Corp. Sec. Litig.*, 404 F.3d at 201 n.17.

Importantly, objectors must produce an improvement in the settlement "worth more than the fee they are seeking; otherwise they have rendered no benefit to the class." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (citing cases); *accord Arnett v. Bank of Am., N.A.*, No. 3:11-CV-1372-SI, 2014 WL 5419125, at \*2 (D. Or. Oct. 22, 2014); *Fraley v. Facebook, Inc.*, 2014 WL 806072, at \*2 (N.D. Cal. Feb. 27, 2014), *aff'd*, 638 F. App'x 594 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 68 (2016); *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, No. 01-CV-01451-REB-CBS, 2007 WL 2087536, at \*2 (D. Colo. July 17, 2007); *see also* David F. Herr, *Annotated Manual for Complex Litigation, Fourth* § 21.643, at 437 (rev. ed. 2016) (cautioning that "[f]ee awards made on the basis of insignificant or cosmetic changes in the settlement serve to condone and encourage improper use of the objection process").

In all, "[c]ases in which objectors are awarded attorney's fees are few and far between." *Spark v. MBNA Corp.*, 289 F. Supp. 2d 510, 513 (D. Del. 2003); *Martin v. Foster Wheeler Energy Corp.*, No. 3:06-CV-0878, 2008 WL 906472, at \*10 (M.D. Pa. Mar. 31, 2008); *Mirfasihi v. Fleet Mortg. Corp.*, No. 01 C 722, 2007 WL 2608778, at \*5 (N.D. Ill. Sept. 6, 2007), *aff'd*, 551 F.3d 682 (7th Cir. 2008).

## **B. The Three Objector Cross-Petitions**

### **1. The Faneca Objectors' Petition**

Not long ago, the Faneca Objectors<sup>31</sup> castigated the class-wide Settlement as "a capitulation" and "a sell-out." ECF No. 6201, at 16, 84.<sup>32</sup> Among the many accusations they

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<sup>31</sup> The Faneca Objectors (formerly known as the Morey Objectors) are Class Members Alan Faneca, Ben Hamilton, Robert Royal, Roderick "Rock" Cartwright, Jeff Rohrer, and Sean Considine, who unsuccessfully sought to formally intervene in this litigation (ECF Nos. 6019, (Footnote continued . . .))

levelled was that, motivated by the desire for pecuniary gain, Class Counsel had conducted a misleading “propaganda” campaign in support of final approval. *See id.* at 63 (asserting that “Class Counsel – *who stand to receive a huge payday* upon approval – have falsely described the Settlement to the media.”) (emphasis added); *id.* at 16 (complaining that the NFL “gets a near-absolute release without providing adequate and reasonable compensation in return,” while “Class Counsel . . . get an extraordinary fee”). Moreover, before the Third Circuit they accused Class Counsel of having done “very little work.” Seeger Supp. Decl., Ex. AA, at 18 (Third Circuit 23(f) Petition).

Twenty-seven months after hurling these accusations, the Faneca Objectors were back in this Court. Only now, however, their tune had changed. They had reinvented themselves as virtual co-architects of the Settlement, and their pitch was that a number of modest adjustments to and clarifications of the Settlement to which the Settling Parties agreed after the Rule 23(e)(2) Fairness Hearing – *all of which were proposed by the Court* (ECF No. 6479) – merit an outsized reward of \$20 million, which is almost one-fifth of the Attorneys’ Fees Qualified Settlement Fund established under the Settlement to compensate Class Counsel, and of the approximately \$106.82 million in fees requested by Class Counsel.<sup>33</sup> *Compare* Faneca Objectors’ Mem. of

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6107), and who filed objections to the Settlement on October 6, 2014 (ECF No. 6201; *see also* ECF Nos. 6232, 6455, 6469-70). Three of their cohorts, including the former lead objector in this faction (Sean Morey), dropped out as objectors in favor of opting out of the Class. *See* ECF No. 7070-1, at 14 n.11; *see also* ECF No. 6507-1, at 2, 4 (Claims Administrator’s Eighth Opt-Out Report, noting timely opt-outs of Sean Morey, Ben Hamilton, and Robert Royal).

<sup>32</sup> Except where otherwise noted, where documents filed on the Court’s ECF system are cited, page number references thereof are to the ECF pagination rather than the pagination at the bottom of the original document.

<sup>33</sup> *See* Settlement Agreement §§ 21.2, 23.7 (ECF No. 6481-1), at 82, 90 82 (providing, *inter alia*, that “the NFL Parties’ obligation to pay class attorneys’ fees and reasonable costs is (Footnote continued . . .)



Law in Support of Pet. for an Award of Attorneys' Fees and Expenses [ECF No. 7070-1] ("Faneca Br.") at 31, 37, 39, 47-48 *with* ECF No. 7151, at 3, 56.<sup>34</sup> This is simply ludicrous.

**a. The Faneca Objectors Wrongly Take Credit for the Post-Hearing Modifications to the Settlement**

As an initial matter, in both their petition and their preliminary response to both other objections and the Armstrong Objectors' cross-petition for a fee award,<sup>35</sup> the Faneca Objectors gloss over the salient fact that they were not out to improve the Settlement but to torpedo it. They challenged it at the preliminary approval stage (including by trying to take an interlocutory appeal via a Rule 23(f) petition), as well as at the final approval stage. Nor were they content with the improvements that they *now* extol and robustly value at anywhere from \$102.5 to \$120.4 million but, instead, appealed this Court's final approval decision to the Third Circuit. In short, they sought to block the Settlement, vigorously asserting alleged intra-class conflicts and dismissing the deal as a "sell-out." They do not deserve to be compensated for their aggressive – and fortunately unsuccessful – campaign. As one court aptly put it, "it is difficult to perceive

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limited to those attorneys' fees and reasonable costs ordered by the Court as a result of the initial petition *by Class Counsel*") (emphasis added); Order filed Mar. 7, 2017 (ECF No. 7246).

<sup>34</sup> Citations to the Faneca Objectors' brief in support of their fee petition are to the page numbers of the original document, not the ECF pagination.

<sup>35</sup> The "Armstrong Objectors" are Class Members Raymond Armstrong, Larry Barnes, Larry Brown, Drew Coleman, Kenneth Davis, William B. Duff, Kelvin Mack Edwards, Sr., Phillip E. Epps, Gregory Evans, Charles L. Haley, Sr., Mary Hughes, James Garth Jax, Ernest Jones, Michael Kiselak, Dwayne Levels, Darryl Gerard Lewis, Gary Wayne Lewis, Jeremy Loyd, Lorenzo Lynch, Tim McKyer, David Mims, Clifton L. Odom, Evan Ogelsby, Solomon Page, Hurles Scales, Jr., Barbara Scheer, Kevin Rey Smith, Willie T. Taylor, George Teague, and Curtis Bernard Wilson, who filed objections to final approval of the Settlement (ECF Nos. 6233 [am. initial objections], 6503 [supplemental objections]); unsuccessfully appealed this Court's Final Approval decision to the Third Circuit (ECF No. 6551 [notice of appeal]); and then unsuccessfully petitioned the Supreme Court to review the Third Circuit's decision affirming this Court, *Armstrong v. NFL*, 137 S. Ct. 607 (2016) (No. 16-413) (denying *certiorari*).

why a lawyer should be awarded fees for a settlement that he or she is trying their best to see is never paid to the class members.” *Zawikowski v. Beneficial Nat’l Bank*, No. 98 C 2178, 2001 WL 290402, at \*1 (N.D. Ill. Mar. 22, 2001).

At any rate, as noted above, it was the Court that proposed the changes for which the Faneca Objectors want \$20 million. *See* Section IV.B.1, *supra*. Not surprisingly, courts have uniformly declined to award attorneys’ fees to objectors where they did not rely on the objectors’ arguments or where an objector’s suggestions merely coincided with the court’s. *See In re Polyurethane Foam Antitrust Litig.*, 169 F. Supp. 3d 719, 721, 723 (N.D. Ohio 2016) (denying fees to objector where court “decided these issues on its own”; “[t]his Court’s analysis was not substantially enhanced *because of* [the] Objection, nor was the fee reduction ordered by this Court *attributable to* [objector’s] arguments”) (emphasis in original); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2010 WL 3328249, at \*2 (W.D. Ky. Aug. 24, 2010) (“There was no cause and effect between the decisions of this case and the action of the [objector], even if at times it coincided with some of the [objector’s] suggestions”); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 132 (S.D.N.Y. 2009) (denying objectors’ counsels’ request for fees because modifications to notice program “were entirely on the Court’s initiative and devised by the Special Master and the parties”), *aff’d sub nom. Priceline.com, Inc. v. Silberman*, 405 F. App’x 532 (2d Cir. 2010); *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 393 (S.D.N.Y. 2005) (denying objectors’ fee application where “[f]undamentally, the Court needed little or no assistance from the Objectors” in determining changes to class counsel’s fee application).

At a minimum, where a court itself contemplated the same points raised by objectors “the significance of [the objectors’] efforts is sharply reduced under the circumstances” and warrants

reduced compensation. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 842 F. Supp. 2d 346, 351 (D. Me. 2012) (reducing award by almost one-half that requested by objector; although objector “must decide whether to object without knowing what objections may be moot because they have already occurred to the judge,” where court had already been disposed towards change urged by objector “the significance of his efforts is sharply reduced under the circumstances”) (citation and internal quotation marks omitted).

Simply stated, the Faneca Objectors “have vastly overstated the role they played in this case.” *Azizian v. Federated Dep’t Stores, Inc.*, No. C-03-3359 SBA, 2006 WL 4037549, at \*2 (N.D. Cal. Sept. 29, 2006) (internal quotation marks omitted); *accord In re Cardinal Health, Inc. Secs. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008) (objectors “drastically overestimated their value”). Accordingly, the Court should deny their petition or, at most, grant a *de minimis* award consistent with a *de minimis* contribution to the Class.

**b. The Faneca Objectors Overvalue the Post-Fairness Hearing Changes to the Settlement**

Time and again, the Faneca Objectors’ contentions cry out for a reality check. The assertion that the modifications for which they seek credit (leaving aside whether they are in fact entitled to any credit) added anywhere from \$102.5 to \$120.4 million in value to the Settlement is pure fantasy. *See* Faneca Br. (ECF No. 7070-1), at 20-28; ECF No. 7366-1, at 7 (Decl. of CPA Joseph J. Floyd).

As demonstrated by the accompanying Updated Analysis of Dr. Vasquez, *see* Seeger Supp. Decl., Ex. JJ, the change of the Death with CTE Monetary award date, the crediting of NFL Europe playing time towards Eligible Seasons (*see* Settlement Agreement § 2(kk), ECF No. 6481-1, at 13), and the assurance of funding to provide BAP examinations to all Class Members (*see* Settlement Agreement § 23.3(d), ECF No. 6481-1, at 87), were cumulatively worth

approximately less than half the value that the Faneca Objectors and their putative expert have ascribed to those changes. Vasquez Updated Analysis at 3 (Table 1).<sup>36</sup> The Faneca Objectors' valuation arguments rest on untenable assumptions, such as their speculation that 96% of the former NFL Football Players who died between July 2014 and April 2015 would have had CTE so as to qualify for a "Death with CTE" award, Faneca Br. at 32-33, even though no medical evidence had been adduced relating to those Class Members. The argument is simply a rehash of the objectors' arguments prior to Final Approval that CTE should in and of itself be compensated because most players have it allegedly have it, an unproven contention resting on shaky scientific evidence.<sup>37</sup>

The Faneca Objectors' contention that the appeal fee waiver for hardship added almost \$11 million in value to the Settlement is based on even flimsier speculation. *See* ECF No. 7070-1, at 27-28. Their putative expert merely parrots this same speculation. *See* ECF No. 7366-1, at 15-16 (CPA Floyd's assumption of same appeal rate as for NFL's disability program). There is simply *no* way to tell how many Class Members will need to appeal Monetary or Derivative Claimant Award determinations, let alone how many will have financial circumstances that necessitate recourse to the hardship waiver. In this respect, the Faneca Objectors' drawing of

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<sup>36</sup> In this respect, Class Counsel rely on the accompanying valuation performed by Dr. Vasquez, an economist with longstanding expertise in this field who has engaged in developing economic models for U.S. and foreign governments, and who has been consulted in numerous litigations and whose Declaration accompanies this memorandum. Earlier, Dr. Vasquez had prepared a valuation of the Settlement that Class Counsel filed with the Court in support of Final Approval. *See* ECF No. 6423-21. By contrast, the valuation that the Faneca Objectors have submitted is from a CPA having no demonstrable experience in the specific realm of settlement valuations. *See* ECF No. 7366, at 5-6.

<sup>37</sup> This argument also ignores that a Class Member who died between July 2014 and April 2015 and received a post-mortem CTE diagnosis also might have been diagnosed years prior, while younger, with another Qualifying Diagnosis, like ALS or Parkinson's Disease. *See* Updated Analysis of Dr. Vasquez (Seeger Supp. Decl., Ex. JJ), at 8 n.6.

parallels between the NFL's disability program and the claims process for MAF benefits is a proverbial apples-to-oranges comparison. The Monetary and Derivative Awards programs will not be run under the NFL's auspices but, rather, by an independent Court-appointed Administrator (ECF No. 6534, at ¶ 13 [confirming appointment of BrownGreer PLC as Claims Administrator]), and Class Counsel's role in overseeing the Settlement's implementation and ensuring fair treatment of Class Members need not be discussed again here. The Court is well aware of it. Any suggestion that the appeal rate will be the same as for the NFL's disability program is pure conjecture.

Finally, the provision relieving Representative Claimants from having to submit medical records where a deceased NFL Football Player had received a Qualifying Diagnosis while he was still alive but his medical records are unavailable due to a *force majeure* type of event (Settlement Agreement § 8.2(a)(ii), ECF No. 6481-1, at 43-44) simply cannot be valued because there is no way to predict the number of instances where recourse to this provision will be necessary, let alone to estimate the value of the benefits at issue for those claims. In any event, even the Faneca Objectors do not claim credit for this modification.

### **c. The Fee Request Is Excessive**

The Faneca Objectors contend that the \$20 million award that they seek is reasonable given their \$4,312,565 lodestar. Faneca Br. (ECF No. 7070-1), at 39-48. In other words, they seek a lodestar enhancement double that of Class Counsel, even though the bulk of their time was spent on *losing*.

Because objectors play a much more limited role in class action litigation than do class counsel, courts do not treat their fee petitions as if they were class counsel and award them fees for all of their work conducted in the course of the litigation. Instead, any fees must be limited to

that work which reflects the value the objectors conferred upon the class. *Spark*, 289 F. Supp. 2d at 513; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 565 (D.N.J. 2003) (objectors “played a different role in this litigation from that of Class Counsel”; hence court would not treat objectors’ fee petition “as if they were class counsel” and objectors would “not be awarded fees for all of their work conducted in the course of this matter”), *aff’d*, 103 F. App’x 695 (3d Cir. 2004); see *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 467-68 (D.P.R. 2011) (denying as “clearly excessive” objectors’ request for same percentage share of increased recovery for class as 23% of common fund granted to lead counsel because “[o]bjectors[’] substantive participation in this litigation was for a much more limited scope and duration than Lead Counsel’s” and they “did not have the responsibility of organizing the Class or defending against motions to dismiss or a host of Lead Counsel’s other obligations”); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 359 (N.D. Ga. 1993) (“An appropriate fee award for objectors . . . would compensate counsel for the reasonable fees and expenses actually accrued in pursuit of their objections, nothing more” where objectors’ counsel “did not work over the course of three years against a vigorous defense in pursuit of complex and unique claims, nor did counsel shoulder the financial burden of pursuing the action. Instead, objectors argued the nuances of the settlement during the twilight of this litigation.”).

Indeed, courts, including in this Circuit, typically have either reduced the claimed lodestars of objectors’ counsel, refused to award them multipliers altogether (or applied multipliers substantially less than the factor sought), or both in order to account for unsuccessful endeavors or for the shorter time span of their involvement in the litigation. *E.g.*, *In re Riverstone Networks, Inc.*, 256 F. App’x 168, 170 (9th Cir. 2007) (district court acted within its discretion “when it discounted hours [claimed by objector’s counsel] that did not benefit the

class”); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 368 (E.D.N.Y. 2010) (reducing objector’s lodestar to account for time expended on issues that produced no benefit to the class); *Park v. Thomson Corp.*, 633 F. Supp. 2d 8, 13 (S.D.N.Y. 2009) (declining to award multiplier because, unlike “class counsel’s involvement with this action since filing the complaint . . . and the significant risks attendant to the litigation,” objector “did not appear in this action until three years later and the time that he devoted to this matter spanned a far shorter interval”); *Parker v. Time Warner Entm’t Co.*, 631 F. Supp. 2d 242, 278-79 (E.D.N.Y. 2009) (reducing objectors’ counsel’s lodestar by one-half and declining to award multiplier given “immodesty of . . . Counsel’s fee petition” that was “astonishing” and counsel’s “exaggerated” conception of scope of changes attributable to objection); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 565 (D.N.J. 2003) (“Objectors will not be awarded fees for all of their work conducted in the course of this matter. Instead, the Court will follow precedent and award fees which reflect the value the Objectors conferred upon the class.”), *aff’d*, 103 F. App’x 695 (3d Cir. 2004); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2016 WL 6909680, at \*8 (N.D. Cal. Oct. 24, 2016) (rejecting objector’s request for 3.0 lodestar multiplier, and weighing his contributions – his raising of “colorable criticisms” of certain features of settlement and “the potential assistance his experience and skill might have brought to the Class had Lead Counsel welcomed it – against his “lack of meaningful involvement in the case, his running antagonism with Lead Counsel, and his ultimate filing of unmeritorious and potentially harmful objections,” and applying lodestar multiplier of 1.15); *Mirfasihi*, 2007 WL 2608778, at \*6-7 (noting that objectors had “burdened the court at least as much as they ha[d] helped it” and reducing award “to account for the burden that the objectors ha[d] placed on all parties involved”); *see also Lobur v. Parker*, 378 F. App’x 63, 64-65 (2d Cir. 2010) (district

Thus, even assuming that the Faneca Objectors were *both* (a) indeed the catalyst for several of the post-Fairness Hearing amendments to the Settlement *and* (b) correct about the value of those changes, they are still not entitled to the huge award they seek because most of what they did – including *all three* of their appeals or putative appeals (among which were their highly irregular Rule 23(f) petition, which the Third Circuit denied for lack of appellate jurisdiction), their motion to intervene (ECF No. 6019), and their motion to take discovery of Class Counsel (ECF No. 6169) – fell flat and achieved nothing for the Class, as the rival Armstrong Objectors note. Armstrong Objectors’ Mem. of Law in Support of Their Pet. for an Award of Attorneys’ Fees (ECF No. 7232) (“Armstrong Br.”) at 13.<sup>38</sup>

JA7365





- The Class Notice was misleading, and inconsistent with both Rule 23(e) and Due Process requirements. Fan. Obj. at 52-63, 67-68. The Faneca Objectors characterized the Class Notice as “outright false.” *Id.* at 17.<sup>43</sup>
- The lack of formal discovery weighed against final approval. Fan. Obj. at 70-72.<sup>44</sup>
- The NFL’s ability to withstand a judgment far greater than the value of the Settlement militated against approval. Fan. Obj. at 72-73; *see also* ECF No. 6420, at 3-9.<sup>45</sup>
- The allegedly negative reaction of Class members to the Settlement warranted its rejection. Fan. Obj. at 74-75.<sup>46</sup>

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undisputed scientific evidence that there are independent factors that could break the causal link between such impairments and football play. *See In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. at 379.

<sup>43</sup> The Court also rejected these arguments, finding that the Class Notice was neither confusing nor misleading and that it comported with both Rule 23 and due process requirements. *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. at 382-86. The Third Circuit agreed. *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 435-56.

<sup>44</sup> This argument was oblivious to both the Court’s stay of formal discovery pending resolution of the NFL’s motion to dismiss on federal preemption grounds (ECF No. 3384) and the fulsome informal discovery that had taken place during the course of settlement discussions and the formal mediation.

<sup>45</sup> The Court determined this consideration to be no worse than neutral given the NFL’s agreement to uncap the Monetary Award Fund. *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. at 394. This not being a case in which the ability to pay was invoked as a limitation on the settlement recovery, the Faneca Objectors’ argument was far from convincing. “[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining [*Girsh*] factors, this fact alone does not undermine the reasonableness of [a] settlement.” *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 323 (3d Cir. 2011) (en banc) (citation and internal quotation marks omitted).

<sup>46</sup> This contention bordered on the frivolous given that fewer than 1% of all Class members lodged objections, and only another 1% opted out. *See In re NFL Players Concussion Injury Litig.*, 821 F.3d at 438. Many of the latter have since rescinded their opt-outs. *See* ECF Nos. 7340-1 (at ¶¶ 5-6), 7374.

- The prospects of establishing the NFL's liability and the Class's entitlement to damages – including the relative strengths and weaknesses of both Plaintiffs' claims and the NFL's defenses – also weighed against approval. Fan. Obj. at 76-83.<sup>47</sup>
- Motions for leave to take discovery, including depositions of Co-Lead Class Counsel Christopher Seeger and the two Subclass Counsel, Arnold Levin and Dianne Nast, pertaining to the settlement negotiations. ECF Nos. 6169, 6211, 6461.<sup>48</sup>
- A petition pursuant to Fed. R. Civ. P. 23(f) to obtain interlocutory review of the Court's preliminary approval of the Settlement.<sup>49</sup>

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<sup>47</sup> This argument pooh-poohed the NFL's formidable defenses, which included federal preemption, assumption of risk, statutes of limitations, statutory employer, and lack of general or specific causation, the first of which it has successfully asserted in a number of lawsuits. *See* ECF No. 7151-1, at 41 n.27 (citing cases).

<sup>48</sup> The Court denied that motion before the Rule 23(e)(2) Fairness Hearing. ECF No. 6245. Discovery of class counsel by objectors is disfavored, and the Faneca Objectors demonstrated nothing to warrant it. *See Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir. 1987) (discovery of class counsel "is proper only where the party seeking it lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive"); *In re Domestic Air Transp. Antitrust Litig.*, 144 F.R.D. 421, 424 (N.D. Ga. 1992) ("Objectors are not entitled to discovery concerning settlement negotiations between the parties in the absence of evidence indicating that there was collusion between plaintiffs and defendants in the negotiating process."); Herr, *Annotated Manual for Complex Litigation, Fourth* § 21.643, at 438 ("A court should not allow discovery into the settlement-negotiation process unless the objector makes a preliminary showing of collusion or other improper behavior.") (footnote omitted).

<sup>49</sup> The Third Circuit denied the 23(f) petition on September 11, 2014. ECF No. 6166. In a subsequent opinion explaining the denial, the Court of Appeals' majority held that the court lacked appellate jurisdiction because this Court had "yet to issue 'an order granting or denying class certification,'" *In re NFL Players' Concussion Injury Litig.*, 775 F.3d 570, 588-89 (3d Cir. 2014), and even the dissenting judge agreed that the petition should be denied because the Faneca Objectors were creating "inefficient (indeed, chaotic) piecemeal litigation that would interfere with the formal fairness hearing on the settlement." *Id.* at 589. Neither in their 23(f) petition nor the reply in support thereof did the Faneca Objectors cite a *single* case in which a circuit court had *ever* granted 23(f) review of a preliminary settlement approval order that provisionally certified a settlement class. *See* Seeger Supp. Decl., Exs. AA-BB *passim*. Nor, in the course of their attacking in their 23(f) petition the Class Notice that this Court had approved, did they cite a single case in which a circuit court insinuated itself in the middle of the Rule 23(e) final approval process and required a district court to redo class notice after preliminary approval. *See id.*, Exs. AA (petition) at 17, BB (reply) at 8. Indeed, the Faneca Objectors' (Footnote continued . . .)

- Their motion to intervene (ECF No. 6019).<sup>50</sup>
- An appeal (ECF No. 6136) of this Court's denial of their motion to intervene.<sup>51</sup>
- An unsuccessful appeal (ECF No. 6568) that challenged this Court's decision granting final approval to the Settlement. *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016), *aff'd* 307 F.R.D. 351 (E.D. Pa. 2015).

To award the Faneca Objectors \$20 million on the basis of a \$4.3+ million lodestar built up through so many failed arguments and filings would give them a huge windfall, unfairly rewarding them for inundating this Court and the Third Circuit with this meritless barrage that yielded no benefit to the Class. *See Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 688 (7th Cir. 2008) (in determining whether to award fees to objectors, court must balance improvements they produced "minus the detriment caused by their courtroom antics"); *In re AT&T Corp. Sec. Litig.*, No. 00-5364 (GEB), 2006 WL 2786945, at \*2 (D.N.J. Sept. 26, 2006) (denying fees where

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misguided effort to have the Third Circuit order this Court to reissue notice would only have sown immeasurable confusion among Class Members. In all, had the Faneca Objectors' interlocutory review gambit succeeded, it would have unnecessarily prolonged this litigation by years and delayed compensation for Class Members so desperately in need of relief. As it is, Subclass 2 representative Kevin Turner would not live to see the resolution of the slew of meritless appeals and *certiorari* petitions filed by the Faneca and Armstrong Objectors and others that attacked the Settlement.

<sup>50</sup> The Court denied this motion on July 29, 2014. ECF No. 6107.

<sup>51</sup> The Faneca Objectors withdrew this appeal just one week after the Third Circuit's rebuff of their 23(f) petition. *In re NFL Players' Concussion Injury Litig.*, No. 14-3693 (3d Cir. Order granting Fed. R. App. P. 42(b) mot. filed Sept. 18, 2014).

“objections and subsequent appeal resulted in wasteful litigation and delayed the distribution of funds to the Class”).<sup>52</sup>

It is because the Faneca Objectors’ claimed 6,300 hours, *see* Faneca Br. (ECF No. 7070-1), at 5, 44, invariably reflect so much work on fruitless endeavors that, even accepting the inflated value they place on those improvements, the hefty percentage of the asserted improvements or of the total potential fee pool that they seek as a fee is plainly excessive.<sup>53</sup> As the leading class action treatise notes, “[c]ourts are not very sympathetic” to awarding objectors a percentage of what they have generated for a class “for the simple reason that a lodestar cross-check tends to reveal that the objectors’ lawyers did not spend (*or should not have spent*) huge amounts of time on the objection and hence that a percentage award would generate too high a multiplier, or a windfall,” or “since most objections are litigated quickly, a percentage approach is often likely to embody a windfall.” 5 William B. Rubenstein, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 15.94, at 370 (5th ed. 2015) (emphasis added).

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<sup>52</sup> Although the Faneca Objectors have not broken down their time submissions by specific tasks or projects, their counsel’s supporting papers implicitly acknowledge that a huge chunk of the claimed 6,300 hours were invested in these failed endeavors. *See, e.g.*, Molo Decl. at ¶¶ 14-18, 24, 35-41 (ECF No. 7070-2, at 5-7, 9, 15-17) (acknowledging his firm’s work on unsuccessful intervention motion, opposition to preliminary approval, Third Circuit appeals, motion to take discovery of Class Counsel, and negotiations with NFL); Declaration of William T. Hangle, dated Jan. 9, 2017 (ECF No. 7070-2, at 59-60), at ¶¶ 6, 9 (acknowledging assistance on unsuccessful intervention motion, opposition to preliminary approval, and Third Circuit appeals); Declaration of Linda S. Mullen, dated Jan. 9, 2017 (ECF No. 7070-2, at 80), at ¶¶ 6, 8 (same). At any rate, this conclusion is inescapable given the plethora of unsuccessful filings and arguments catalogued above.

<sup>53</sup> Co-Lead Class Counsel wish to be clear here that they are *not* suggesting that the hours claimed by the Faneca Objectors’ counsel were not genuinely expended. Nor are they calling into question the reasonableness of the time it took to put together various filings, the quality of their work, or the reasonableness of counsel’s hourly rates. Rather, the point here is that the Faneca Objectors cannot be compensated for so much unsuccessful work because objector counsel simply do not stand on an equal footing with court-appointed attorneys for a class in matters of compensation.

Consequently, if the Court determines that some award to the Faneca Objectors is in order, the Court should steeply reduce their counsels' lodestar. Alternatively, or in addition, the Court should apply a negative multiplier to their lodestar. *See* Section IV.B.1.c(2), *infra*.

**(2) The Requested \$20 Million Award Would Result in More Favorable Treatment of the Faneca Objectors Than of Class Counsel**

Not only was so much of the Faneca Objectors' time invested in futile efforts and arguments that did not benefit the Class, but also even accepting the value that they place on the post-Fairness Hearing modifications to the Settlement, the Faneca Objectors' request for nearly one-fifth of the Attorney's Fees Qualified Settlement Fund represents more than *twice* the roughly 9% of the Settlement's benefit value that the NFL has agreed to pay in fees and which Class Counsel are seeking for all of their work in the case, which spanned some five years. *Compare* Faneca Br. at 31, 39 with ECF No. 7151-1, at 14, 50. Indeed, it is deceptive for the Faneca Objectors to argue that they are seeking "a reasonable percentage" (Faneca Br. at 31) when they know (or ought to know) full well that any fee award to the team of lawyers who litigated this case, secured the Settlement, and defended it is effectively capped *at less than half* that percentage by the very terms of the Settlement. Likewise, the Faneca Objectors' requested award represents a 4.6 multiplier on their lodestar, which is almost 1.8 times the 2.6 multiplier that Class Counsel would receive on their lodestar if the Court grants the full award that the latter seek. *Compare* Faneca Br. at 48 with ECF No. 7151-1 at 14, 50, 67.

It would be inequitable for objector counsel – who had a much more limited role in the litigation overall and most of whose work was for naught – to receive a higher multiplier on their lodestar and an award amounting to a much more generous fraction of their alleged contributions than would Class Counsel. *See* *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 815-16 (N.D. Ohio 2010) (where objector sought higher multiplier than that granted to class counsel,

court held multiplier unwarranted given objector's and his counsel's "very limited role in th[e] litigation"); *Park v. Thomson Corp.*, 633 F. Supp. 2d 8, 13 (S.D.N.Y. 2009) (denying multiplier to objector's counsel John Pentz (who is also counsel for objector Cleo Miller here (*see* ECF No. 7161); noting that class counsel's multiplier "was based, *inter alia*, on class counsel's involvement with this action since filing the complaint . . . and the significant risks attendant to the litigation," whereas Pentz "did not appear in this action until three years later and the time that he devoted to this matter spanned a far shorter interval").

Notably, the Faneca Objectors cite no case in which a court handed an award of fees to objector counsel of the magnitude that they seek. To the contrary, their own cases undermine their request. In *In re Ikon Office Solutions, Inc., Securities Litigation*, 194 F.R.D. 166 (E.D. Pa. 2000) (Faneca Br. at 48), this Court awarded a modest fee of \$10,000 to the objectors out of more than \$32.4 million awarded to class counsel. *Id.* at 197. In *Great Neck Capital Appreciation Inv. P'ship, LP v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400 (E.D. Wis. 2002) (Faneca Br. at 48), the court awarded class counsel \$3,045,000 out of a settlement fund of \$10,150,000, and rejected as excessive the objector's request for a 10% cut of that fee award (about half of the percentage the Faneca Objectors seek here), awarding them instead 5 percent (or \$152,500). *Id.* at 412, 416. In *Dewey* (Faneca Br. at 39-40), the 13.4% of the value added by the objectors (again, a substantially lower percentage than what the Faneca Objectors seek here) amounted to a modest award of under \$105,000. *Dewey*, 909 F. Supp. 2d at 397. Finally, the Faneca Objectors' reliance on *Lan v. Ludrof*, No. 1:06CV114-SJM, 2008 WL 763763 (W.D. Pa. Mar. 21, 2008) (Faneca Br. at 40), misfires because the 25% of the increased value that the court awarded there was one-fourth of the \$157,028.31 reduction of class counsel's fees that resulted when class counsel unilaterally lowered his fee request from 28% of the settlement fund



to 25% in response to the objector's arguments. Thus, the court there gave the objector a small slice of the total fee pot, amounting to just over \$39,000. 2008 WL 763763, at \*\*8, 30 & n.15.

In short, if the Court determines that the Faneca Objectors should be granted some measure of compensation for having added value to the Fairness Proceedings, any award must be dramatically less than the \$20 million they seek. They should be compensated, in an amount to be determined by the Court in the exercise of its discretion, only for the responsibility that the Court entrusted to them – to serve as liaison and coordinate the objectors' presentations at the Fairness Hearing, *see* Notice dated Nov. 4, 2014 (ECF No. 6344) – and their lodestar markedly reduced to account for their many unsuccessful arguments and filings. *See generally Institutionalized Juveniles v. Sec'y of Pub. Welfare*, 758 F.2d 897, 925 (3d Cir. 1985) (“A court has discretion to decide whether it is proper to adjust the lodestar by a general reduction of the lodestar, by the complete disallowance of hours spent litigating wholly unsuccessful claims, or by use of both methods.”).

Moreover, no multiplier should be applied to the Faneca Objectors' lodestar – and certainly not the robust 4.6 multiplier they seek. As an alternative to (or even in addition to) sharply reducing the number of hours in the Faneca Objectors' lodestar, the Court should apply a *negative* multiplier so as to adjust their lodestar for their many unsuccessful filings and arguments. *See In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 600 (3d Cir. 1984) (district court entitled to apply negative quality multiplier even after properly “eliminate[ing] from the lodestar . . . so many hours for activities deemed not beneficial to the class”); *Azizian*, 2006 WL 4037549,



at \*10 (recommending negative multiplier of .3 to objectors’ lodestar “based upon the limited extent of their contributions”).<sup>54</sup>

## **2. The Armstrong Objectors’ Petition**

The Armstrong Objectors’ fee request is seemingly more modest. They seek just under \$600,000, in contrast to the \$20 million requested by the Faneca Objectors, based on a smaller lodestar and a renunciation of any claim to a multiplier. Armstrong Br. (ECF No. 7232), at 23, 28, 34; *see also* ECF Nos. 7232-1 to 7232-4 (declarations of counsel, setting forth lodestars). Notwithstanding how they try to rewrite history and spin their role in the Final Approval proceedings, however, the Armstrong Objectors have no claim whatsoever. Indeed, their fee request (which, as the Faneca Objectors point out, is in large measure a knockoff of the latter’s fee petition, *see* ECF No. 7366, at 2, 5) is shameless, for the path they blazed was destructive, not constructive. Their only role was to try to derail the Settlement, a goal they pursued with zeal. Importantly, their assertion that three of the five February 2015 modifications to the Settlement stemmed from their arguments is bereft of merit.

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<sup>54</sup> Indeed, in non-class cases, this and other courts in this Circuit often apply a negative multiplier where a litigant has achieved only limited success. *E.g.*, *Finch v. Hercules Inc.*, 941 F. Supp. 1395, 1427 (D. Del. 1996) (reducing lodestar by 35% where plaintiff “did not obtain excellent results in this case”); *Sch. Dist. of Philadelphia v. Deborah A.*, No. 08-2924, 2011 WL 2681234, at \*2, \*4-5 (E.D. Pa. July 8, 2011) (reducing lodestar by 30% given limited success); *Spencer v. Wal-Mart Stores, Inc.*, No. 03-104-KAJ, 2005 WL 3654381, at \*4 (D. Del. June 24, 2005) (negative multiplier of 75% given limited success), *aff’d*, 469 F.3d 311 (3d Cir. 2006); *Patriot Party of Pa. v. Mitchell*, No. CIV. A. 93-2257, 1993 WL 313667, at \*4 (E.D. Pa. Aug. 16, 1993) (applying .30 negative multiplier in light of “very limited” success); *Decibus v. Woodbridge Twp. Police Dep’t*, Civ. A. No. 88-2926, 1991 WL 59428, at \*6 & n.6 (D.N.J. Apr. 15, 1991) (negative multiplier of 0.5 to account “for limited success”); *Vasquez v. S.S. Pennock Co.*, Civ. A. No. 86-2288, 1987 WL 9781, at \*2 (E.D. Pa. Apr. 21, 1987) (same); *see generally Hensley*, 461 U.S. at 436 (“If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff’s claims were interrelated, nonfrivolous, and raised in good faith.”).

**a. The Armstrong Objectors' Role Was Not Constructive**

Before this Court, the Armstrong Objectors raised a multitude of alleged shortcomings to the Settlement. Among other things, they complained that numerous ailments are not compensated, the Monetary Awards are insufficient, the Monetary Award offsets are flawed, the “Death with CTE” cutoff date is irrational, the BAP participation requirements are onerous, the creation of a designated pool of BAP physicians is unfair, the Settlement wrongly allows the NFL unlimited appeals, the Settlement’s funding is inadequate, the Settlement does not take scientific advances into consideration, the release of the NFL Parties is too broad, and the Education Fund is an improper *cy pres* fund. ECF No. 6233, at 10-35. They threw the proverbial plate of spaghetti against the wall, no doubt hoping that something might stick.

When this kitchen sink strategy did not work and the Court overruled their objections – which was not surprising given their lack of merit<sup>55</sup> – the Armstrong Objectors took a different tack on appeal. Before the Third Circuit, they challenged the deal as structurally infirm and inadequate by making *Class Counsel* the focus of their wrath, arguing that Class Counsel had sacrificed the best interests of the Class by engaging in self-dealing.

Specifically, the Armstrong Objectors contended that Class Counsel were “compromised,” having “bargained away” Class Members’ claims by securing a “sub-optimal”

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<sup>55</sup> By way of example, the Armstrong Objectors asserted that the Monetary Awards are insufficient by dividing Class Counsel’s projected *payout* of the MAF by the number of Class Members who will likely receive Monetary Awards in order to come up with an estimated Monetary Award of \$135,000-\$225,000 per Class Member. *See* ECF No. 6233, at 14-15. That was a dubious exercise because (a) the MAF is *uncapped* and therefore there is no dividend to be divided so as to arrive at a quotient (*i.e.*, a “typical” award), and (b) it lumped together Monetary Awards as one-size-fits-all compensation, ignoring the matrix that individually calibrates awards by degree of neurological impairment, age, and time played in the NFL and affiliates, and, applies offsets such as a stroke suffered prior to a Qualifying Diagnosis. *See* Settlement Agreement § 6.7(b)-(e) & Ex. A-3, ECF No. 6481-1, at 40-41, 122.

deal in return for a “windfall,” “red-carpet treatment,” and a “free pass” on their fees, thus “effectively insulat[ing] [their] fees from scrutiny” and “thwarting judicial review by design” – and proving that the Class had been inadequately represented and denied due process. *See* Seeger Supp. Decl., Ex. CC, at 21, 25, 27, 46-52 (Armstrong Objectors’ corrected opening Third Circuit brief; internal quotation marks omitted); *see also id.* at 21, 52 (innuendo that Class Counsel could not plausibly have done enough work to justify a \$112.5 million award). Almost at the eleventh hour, the Armstrong Objectors sandbagged Class Plaintiffs with an attack on Subclass Counsel Arnold Levin, which they sprung for the first time in their reply brief, insinuating that Mr. Levin had a foot in both Subclass camps and therefore a fatal conflict of interest. *See id.*, Ex. CC, at 4; *see also id.*, Ex. EE (Class Counsel’s response to Third Circuit motion seeking to take judicial notice of complaints already in the record, noting that alleged conflict had never been raised during Final Approval proceedings and was, in any case, unavailing). The Third Circuit rejected this eleventh-hour attack as meritless. *See In re NFL Players’ Concussion Injury Litig.*, 821 F.3d at 430.

Despite ample precedent supporting it,<sup>56</sup> the Armstrong Objectors maintained that the bifurcation of the Final Approval and fee petition proceedings was per se reversible error, and they accused this Court of having “abdicated its responsibility” in permitting bifurcation. Seeger Supp. Decl., Ex. CC at 3, 25, 47-51.<sup>57</sup>

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<sup>56</sup> *See In re NFL Players Concussion Injury Litig.*, 821 F.3d at 445 (“[T]he practice of deferring consideration of a fee award is not so irregular.”) (citing treatise and cases, including *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 534-35 (3d Cir. 2009)).

<sup>57</sup> Amusingly, one of the arguments that they advanced against the bifurcation of Final Approval and attorneys’ fees proceedings was that, if the two are cleaved, class members have no incentive to challenge a fee petition. *See id.*, Ex. CC at 25, 51. The filing of over a dozen objections to Class Counsel’s February 2017 fee petition exposes that contention for what it was:

(Footnote continued . . .)

**b. Causing Nearly Two Years of Delay Conferred No Benefit on the Class**

Moreover, unlike the Faneca Objectors – who at least were sensible enough to recognize (and have acknowledged here) that there was no issue worthy of a petition for *certiorari*, and delayed relief to the Class by only a year, comprehending that an attempt at Supreme Court review would only further delay Class Members’ receipt of Settlement benefits, *see* Faneca Br. at 20 & n.23 – the Armstrong Objectors showed no such insight or concern and, far from bowing out, dug in their heels further and prolonged their dubious challenges no matter the adverse consequences to Class Members.

In the Third Circuit, the Armstrong Objectors *opposed* Class Counsel’s efforts to expedite the objector appeals. *See* Seeger Supp. Decl., Ex. FF at 2 (Armstrong Objectors’ opposition to motion to expedite appeals, asserting that Class Plaintiffs “have not presented any reasons justifying expediting the briefing in this case”); *see also* ECF No. 7366, at 7 n.5 (Faneca Objectors’ preliminary response to other objector fee petitions, pointing out Armstrong Objectors’ resistance). After the Third Circuit affirmed this Court’s Final Approval of the Settlement, they then delayed the Settlement’s Effective Date by almost five additional months through their pursuit of a baseless Supreme Court appeal.<sup>58</sup> The Armstrong Objectors sought no

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just another objection for the sake of raising objections. That, of course, begs the question of what the ultimate aim might have been.

<sup>58</sup> The Armstrong Objectors’ *certiorari* petition and reply in support thereof merely rehearsed the same vitriol that had fallen flat in the Third Circuit. They attacked the Settlement as “lopsided” and “a zero-sum game, entailing essential allocation decisions designed to confine compensation”; repeated their accusations against Mr. Levin and the bifurcation of the Final Approval and fee petition proceedings; maintained “that the rights of future claimants had been used as bargaining chips to benefit current claimants and their lawyers”; and asserted that “the plaintiffs’ lawyers . . . [had] paper[ed] over” a fatal intra-class conflict by devising the separate Subclasses only after the Settling Parties had agreed upon the framework of the Settlement. Seeger Supp. Decl., Ex. GG, at 2, 5-6, 9-10, 25-30 (*certiorari* petition); *id.*, Ex. HH, at 9 (reply in support of *certiorari* petition) (internal quotation marks omitted).

fewer than *two* extensions (on top of the generous 90 days provided by statute, *see* 28 U.S.C. § 2101(c)) to file their *certiorari* petition. *See id.*, Ex. II (Supreme Court docket entries noting Justice Alito’s Orders granting extension requests).

Far from acknowledging any harm (or even inconvenience) that they inflicted on Class Members (many of whom are ill and in financial straits) – who, on account of the Armstrong Objectors’ groundless appeals, had to wait almost two years after this Court’s Final Approval determination to see the start of the Settlement’s effectuation – the Armstrong Objectors add insult to injury by proclaiming that Class Members *benefitted* from this long delay in that they reaped a “Collateral Time Benefit” that allowed them to go out and obtain allegedly unbiased medical evidence to support their Monetary Award claims. Armstrong Br. at 1, 3, 9-10, 13-15.

This remarkable and condescending assertion that Class Members actually owe the Armstrong Objectors a round of thanks for having hindered the Settlement’s effectuation for nearly two years rests on the unfounded assumption that the pool of MAF physicians will be under the thumb of the NFL and predisposed to reject claims. The Armstrong Objectors offer not a scintilla of evidence to support this attack on the integrity of the MAF physicians, save a vaporous statement that Class Members “distrust” the NFL. *See id.* at 14. It is the *Claims Administrator*, however, not the NFL, who will select the Qualified MAF Physicians, and if Class Counsel have reasonable grounds, they may withhold approval of physicians whom the Claims Administrator selects. *See* Settlement Agreement § 6.5(a), ECF No. 6481-1, at 38. The Armstrong Objectors’ suggestion that Class Counsel will collude with the NFL to “thrust” untrustworthy physicians upon Class Members (Armstrong Br. at 14) is vacuous.

In sum, the Armstrong Objectors’ “Collateral Time Benefit” argument is a poor smokescreen that fails to mask the many months of delays that they needlessly inflicted on Class

Members through their unrelenting meritless assaults on the Settlement. Perhaps the Armstrong Objectors should have asked Plaintiff Kevin Turner, who died from ALS in March 2016, during the pendency of the meritless Third Circuit appeals, how *he* felt about this “Collateral Time Benefit.” Or perhaps they should ask Class Member Rickey Dixon – who suffers from ALS (ECF No. 7299, at 2, 5) and whose financial distress necessitated his obtaining a loan against his anticipated recovery from a third-party litigation funding company, which accrues interest at a usurious rate (*see* ECF No. 7306-2, at 7) – how much *he* appreciates it. Simply stated, this argument is as offensive as it is astounding, and deserves short shrift.

**c. The Armstrong Objectors Wrongly Take Credit for Three Post-Fairness Hearing Modifications to the Settlement**

Nor is there any merit to the Armstrong Objectors’ assertion that the three modifications “mirror[ed]” improvements that they had suggested. *Armstrong Br.* at 7.

To begin with, the Armstrong Objectors claim credit for several of the *same* post-hearing modifications for which the Faneca Objectors maintain that they were the impetus, but they do not even bother to address the Faneca Objectors’ contentions, even though the latter’s fee petition was filed a good seven weeks before their own. *Compare* *Faneca Br.* (filed Jan. 11, 2017) at 21-22, 26-28 (taking credit for “uncapping” of BAP, later “Death with CTE” cutoff date, and appeal fee hardship waiver) *with* *Armstrong Br.* (filed Mar. 1, 2017) at 10-13 (same).

Setting that aside, the record plainly belies the Armstrong Objectors’ argument. Indeed, it is ironic that the Armstrong Objections now tout the three modifications. In their supplemental objections, they had scoffed at them as insignificant, sneering that the Settling Parties had once again “fumbled the ball,” and that “[t]he only relief granted by the amendments . . . [wa]s for the benefit of the NFL Parties.” ECF No. 6503, at 2.

Similarly, the Armstrong Objectors now declare that their objections produced the revision to the Settlement relating to the guaranteed funding of BAP examinations (Armstrong Br. at 10), but in their objections they had never expressed concern that there would not be sufficient funding so that every eligible Class Member receives a BAP examination. *See* ECF No. 6533, at 20-21. Even if their objections were liberally construed as expressing concern about BAP funding limitations, the Armstrong Objectors themselves saw the lifting of the

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funding cap as a modification without any significance, declaring that the BAP “essentially remain[ed] unchanged,” and maintained that it continued to be flawed for the reasons they had previously expressed. ECF No. 6503, at 3.

Because the Armstrong Objectors have failed to demonstrate that they brought about the improvements to the Settlement in question, the Court should deny their fee request. *See Spark*, 289 F. Supp. 2d at 514 (denying fees “[g]iven the absence of evidence that objectors’ actions conferred a benefit upon the class”); *In re Diet Drugs*, 2002 WL 32154197, at \*15 (denying fees where objectors submitted no proof that their objections caused the parties to negotiate amendment to settlement); *In re AT&T Corp. Sec. Litig.*, No. 00-5364 (GEB), 2006 WL 2786945, at \*2 (D.N.J. Sept. 26, 2006) (objectors’ counsel failed “to show that they improved the Class’s recovery in any way”).

In short, the Armstrong Objectors contributed nothing – and deserve nothing.

### **3. The Jones Objectors’ Petition**

Finally, two minor objectors, Preston and Katherine Jones (“the Jones Objectors”<sup>60</sup>), represented by James T. Capretz, also filed a petition for an award of attorneys’ fees (ECF No. 7364) (“Jones Br.”). They claim to have spurred the post-Fairness Hearing amendment to the Settlement that credited Class Members’ time spent playing in NFL Europe towards Eligible Seasons. Jones Br. at 1-4, 6-8. They ascribe a value of \$20 million to this modification, out of which they seek 1.5%, or an award of \$300,000. *Id.* at 4-6, 11.

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<sup>60</sup> These objectors should not be confused with the faction known as the Jimmie Jones Objectors, which consisted of 16 objectors in this Court represented by the law firm of Zuckerman Spaeder LLP (*see* ECF No. 6242), three of whom filed one of the twelve unsuccessful Third Circuit Appeals challenging this Court’s Final Approval decision. *See* ECF No. 6559; *In re NFL Players’ Concussion Injury Litig.*, 821 F.3d at 410, 418.



<sup>61</sup> The Faneca Objectors filed their objections on October 6, 2014. ECF No. 6201. (They subsequently supplemented them. ECF No. 6232). Both the Armstrong and the Jones Objectors filed theirs eight days later, on October 14, 2014. ECF Nos. 6233, 6235.

## V. CONCLUSION

For the foregoing reasons and those set forth in Co-Lead Class Counsel's opening memorandum, the Court should grant Class Counsel the requested \$112.5 million in attorneys' fees and reimbursement of costs and expenses; (2) adopt a 5% set-aside on all Monetary and Derivative Claimant Awards; (3) grant the requested Case Contribution Awards to the three Subclass Representatives (or, as appropriate, to their estates); and (4) deny the Faneca, Armstrong, and Jones Objectors' fee petitions or, in the alternative, make an award solely to the Faneca Objectors, and then only for their work as liaison on behalf of all objectors, in an amount to be determined by the Court.

Date: April 10, 2017

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on April 10, 2017.

/s/ Christopher A. Seeger  
Christopher A. Seeger

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS'  
CONCUSSION INJURY LITIGATION

Kevin Turner and Shawn Wooden, on behalf of themselves  
and others similarly situated,

Plaintiffs,

V.

National Football League and NFL Properties LLC,  
successor-in-interest to NFL Properties, Inc.,

Defendants.

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

CIVIL ACTION NO: 2:14-cv-  
00029-AB

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**SUPPLEMENTAL DECLARATION OF CHRISTOPHER A. SEEGER IN  
FURTHER SUPPORT OF CO-LEAD CLASS COUNSEL’S PETITION  
FOR AN AWARD OF ATTORNEYS’ FEES, REIMBURSEMENT OF COSTS  
AND EXPENSES, ADOPTION OF A SET-ASIDE FROM MONETARY AND  
DERIVATIVE CLAIMANT AWARDS, AND CASE CONTRIBUTION AWARDS  
FOR CLASS REPRESENTATIVES, AND IN OPPOSITION TO OBJECTORS’  
CROSS-PETITIONS FOR AWARDS OF ATTORNEYS’ FEES AND EXPENSES**

CHRISTOPHER A. SEEGER declares, pursuant to 28 U.S.C. § 1746, based upon his personal knowledge, the following:

1. I am fully familiar with the matters set forth herein, including the procedural history of this litigation and the class-wide settlement that this Court approved. I submit this Supplemental Declaration in further support of the consolidated petition of Class Counsel for a global award of attorneys' fees and reimbursement of expenses, the adoption of a set-aside of five percent of each Monetary Award and Derivative Claimant Award ("Class Counsel's Fee Petition"), and case contribution (*i.e.*, incentive or service) awards for the Subclass Representatives, and in opposition

to the three objector cross-petitions for awards of attorneys’ fees and expenses, filed by the so-called Faneca Objectors, Armstrong Objectors, and Jones Objectors (ECF Nos. 7070, 7230, 7364).<sup>1</sup>

2. Annexed hereto as Exhibit Z is the Declaration of Bradford R. Sohn, dated March 28, 2017 (“Sohn Declaration”), in support of Class Counsel’s Fee Petition. As he explains in his Declaration, Mr. Sohn was unable to prepare it in time for the filing of Class Counsel’s Fee Petition because the materials for the submission of common benefit time and expenses had been sent to his former law firm and there was a delay in those materials being forwarded to him. Mr. Sohn’s lodestar for common benefit work performed in this litigation is \$26,250. When added to the \$40,559,978.60 lodestar set forth in Class Counsel’s Fee Petition, *see* ECF No. 7151-1, at 64, that now brings the total adjusted lodestar to \$40,586,228.60.

3. Annexed hereto as Exhibit AA is a true copy of the petition (of which the exhibits thereto have been omitted), pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, that the Faneca Objectors (at the time known as the Morey Objectors) filed in the United States Court of Appeals for the Third Circuit (“Third Circuit”) on July 21, 2014, seeking permission to appeal this Court’s preliminary approval of the pre-amended settlement and its preliminary certification of the settlement class.

4. Annexed hereto as Exhibit BB is a true copy of the reply that the Faneca (formerly known as the Morey) Objectors filed on August 14, 2014, in support of their Rule 23(f) petition to the Third Circuit.

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<sup>1</sup> For the sake of brevity and simplicity, in this Supplemental Declaration I borrow the shorthand definitions that are employed in the opening memorandum of law in support of Class Counsel’s Fee Petition (ECF No. 7151-1) and the accompanying omnibus reply memorandum of law.

5. Annexed hereto as Exhibit CC is a true copy of the corrected opening brief that the Armstrong Objectors filed in the Third Circuit on September 14, 2015 (the original brief having been filed on August 24, 2015), in support of their appeal of this Court's April 22, 2015 Final Approval of the Settlement.

6. Annexed hereto as Exhibit DD is a true copy of the reply brief that the Armstrong Objectors filed in the Third Circuit on October 7, 2015, in further support of their appeal of this Court's Final Approval of the Settlement.

7. Annexed hereto as Exhibit EE is a true copy of the opposition that Class Plaintiffs filed in the Third Circuit on October 13, 2015, in opposition to the motion of the Armstrong Objectors to take judicial notice of certain complaints that were already part of the record.

8. Annexed hereto as Exhibit FF is a true copy of the opposition that the Armstrong Objectors filed in the Third Circuit on June 1, 2015, to Class Plaintiffs' motion to expedite the briefing of the various objector appeals of this Court's April 22, 2015 Final Approval decision.

9. Annexed hereto as Exhibit GG is a true copy of the petition for writ of *certiorari* (with appendices omitted) that the Armstrong Objectors filed in the United States Supreme Court ("Supreme Court") on September 26, 2016 (No. 16-413), seeking review the Third Circuit's April 18, 2016 decision affirming this Court's Final Approval of the Settlement.

10. Annexed hereto as Exhibit HH is a true copy of the reply in support of their petition for writ of *certiorari* that the Armstrong Objectors filed in the Supreme Court on November 21, 2016.

11. Annexed hereto as Exhibit II is a true copy of the docket of the Armstrong Objectors' petition for writ of *certiorari*. This docket printout was obtained from the Supreme Court's website (<https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-413.htm>)

(last accessed Mar. 31, 2017), and shows the two extensions granted by Justice Alito (over the opposition of Class Counsel) on the motions of counsel for the Armstrong Objectors for extensions of time to file their *certiorari* petition.

12. Annexed hereto as Exhibit JJ is a true copy of a report dated April 10, 2017, entitled *An Updated Analysis of the NFL Concussion Settlement*, which was prepared by Dr. Thomas Vasquez of Ankura Consulting Group.

13. Annexed hereto as Exhibit KK is a true copy of the Declaration of Claims Administrator, Orran L. Brown, Sr., dated April 10, 2017.

14. With respect to their request for a five-percent set-aside in their opening fee petition papers, Co-Lead Class Counsel provided multiple examples of the types of work that would be required as the Settlement was administered over the next 65 years. Nevertheless, because several objectors demand more detail, I set it forth herein.<sup>2</sup>

15. By way of example and based upon the limited data available thus far, in the first quarter of 2017 alone, my firm (Seeger Weiss LLP) already has invested over \$600,000 in lodestar devoted to the below-described tasks. Two senior attorneys at Seeger Weiss (including one partner) have been working virtually full-time, and another attorney as well as a paralegal have been working part-time, on these common benefit implementation-related tasks since even before the Settlement's January 7, 2017 Effective Date. The work that they have done (and will do in the future) is enumerated below and captures only the major tasks that have been undertaken and can be anticipated to launch and maintain the Settlement Program.

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<sup>2</sup> To date, most of the of the Settlement implementation work has been performed by the Co-Lead Class Counsel firms, although other Class Counsel firms have lent assistance, such as with the vetting of BAP and MAF physicians and review of registration and claim documents. For the sake of brevity and simplicity, I collectively refer to work done by "Class Counsel."

16. Both Class Counsel and the Court have recognized the importance of ensuring that all Class Members received clear, concise notice of the Effective Date for the Settlement and the need to register by August 7, 2017. To maximize participation, Class Counsel drafted and had the Claims Administrator disseminate via mail, email, and on the Settlement website ([www.nflconcussionsettlement.com](http://www.nflconcussionsettlement.com)), the Pre-Registration Notice, and once the Registration opened on February 6, 2017, the formal Supplemental Notice advising that Registration was open was drafted and disseminated. In addition, Class Counsel are engaged in ongoing efforts to inform Class Members of the need for and ease of registration to enjoy the benefits of the Settlement, including further mailings.

17. Class Counsel have worked to retain the administrators and Special Masters, conferring with them and with counsel for the NFL Parties to execute all necessary documentation for formal retention as well as developing documents that establish the fundamental operation of each of the Administrators, including Conflict of Interest plans and operational procedures.

18. Similarly, we have worked to retain the Settlement Trustee and execute the necessary documentation to ensure that the Settlement Trust was established and would continue funding Settlement Benefits throughout the 65-year term of the Settlement.

19. In addition, Class Counsel has worked with counsel for the NFL Parties, the Administrators, and the Settlement Masters to ensure that all forms required for the various medical providers were created in time to review the documents and vet the medical providers so as to have selections of providers agreed to by the Settling Parties well in advance of the dates of launch of the BAP and MAF.

20. Class Counsel dedicated many hundreds of hours with the Claims Administrator, the NFL Parties, and the Special Masters to the negotiation and development of the registration



forms and procedures to ensure that the process was efficient and accessible so that no eligible Class Member would be denied entry. Besides the creation of the hard-copy forms, Class Counsel worked alongside the other parties to launch the on-line registration portal which enables Class Members to register in a matter of minutes. Underlying the registration process are hundreds of pages of procedures and other guidance documents that were created through the collaborative process discussed above.

21. Class Counsel has worked and will continue to work with the Claims Administrator to continually update the Settlement website, including its “Frequently Asked Questions” section. This work was particularly intense during several critical moments in the Settlement’s life thus far, including the triggering of the Effective Date, the launch of Registration, and the commencement of the period to file Claims. This platform is particularly valuable to ensuring that Class Members have easy access to the most up-to-date information and clear guidance on the Settlement Program.

22. Class Counsel continue to work on revisions to the Settlement website as new phases begin and additional forms and other documents become available for the Class Members, such as those relating to the BAP Program and the appeals process. Additionally, Class Counsel worked with the Claims Administrator to assist in the transition of the handling of Class Member calls from the Call Center to the Claims Administrator, once the Effective Date was triggered.

23. Moreover, Class Counsel worked with counsel for the NFL Parties, the Administrators, and the Settlement Masters to ensure that all forms needed to submit a claim were prepared, and that they were all-inclusive and easily understandable. These forms covered not only the basic claim form, but also the supporting forms that need to be submitted to perfect a claim, including the Diagnosing Physician Certification Forms, and the Pre-Effective Date

Diagnosing Physician Certification Form, so that the claims by those Class Members who received Qualifying Diagnoses prior to the Effective Date can be processed as quickly as possible.

24. Additionally, Class Counsel worked with the Claims Administrator, the NFL Parties and the Special Masters to launch an online Claims Portal, where Class Members are guided through the claims submission process. Underlying the entire claims process are hundreds of pages of procedures and other guidance documents that were created through the collaborative process discussed above.

25. As requested by the Court, and as part of their wider efforts to reach out to the Class about the Settlement Program, Class Counsel prepared a presentation for Class Members for the February 8, 2017 status conference (which the Court convened to address the status of the Settlement's implementation) and arranged for the conference to be live-streamed on the internet. The presentation at the conference was designed to explain to Class Members watching and listening to the internet broadcast the next steps they needed to take, to inform them of the efforts being expended by all involved to get the Settlement programs up and running, to answer questions, and most of all to encourage registration.

26. Additionally, Class Counsel has conducted several webinars to speak to Class Members through the internet, to encourage registration and to answer questions about the Settlement, its benefits and how to obtain the benefits. These webinars, like the wider outreach efforts, will be ongoing.

27. Conversely, Class Counsel has had to battle the spreading of *misinformation* to Class Members. We have received numerous reports of written and oral communications, containing inaccurate or misleading information about the Settlement, to Class Members by those seeking to profit from Class Members by charging fees or securing portions of Class Members'

29. The time-consuming vetting process associated with the selection of those who will serve as Qualified BAP Providers and Qualified MAF Physicians has led to the initial launch of the MAF network and preliminary establishment of the BAP Provider network while Co-Lead Class Counsel and the other relevant parties continue to recruit and contract with additional physicians and providers. Class Counsel have been participating in this work on virtually a daily

basis since the Effective Date and fully expect that the BAP Administrator will remain on track to begin scheduling BAP examinations as of May 7, 2017, with the BAP opening on June 6, 2017. On April 7, 2017, the list of Qualified MAF Physicians who are authorized to make post-Effective Date Qualifying Diagnoses was made available on the Settlement website.

30. Working with the BAP Administrator, the Claims Administrator, the NFL Parties and their own experts, Class Counsel have developed the services agreement that each physician and provider will need to sign to serve in the networks. Through this same process, the Settling Parties have prepared the manuals that will be used by each of the administrators to train the physicians and providers on the medical aspects of the settlement, including the testing regimen at the heart of the BAP Program and what constitutes a Qualifying Diagnosis for the MAF.

31. Maintaining these networks over the life of the Settlement will require the same kind of engagement in recruiting new physicians and providers as the Settlement, like the Retired NFL Players and the original physicians and providers, age.

32. Moreover, Co-Lead Class Counsel will be actively monitoring and reviewing of these networks to ensure that the Retired NFL Football Players are receiving the care and services that they deserve under the Settlement.

33. Given the Settlement's 65-year term and the volume of claims that will be submitted, appeals of Monetary and Derivative Claimant Award determinations will inevitably be filed, be they disputes of benefit denials or about the amount of an award, and there will likely be appeals of registration denials as well. Besides Class Members themselves, Section 9.5 of the Settlement Agreement confers standing on Co-Lead Class Counsel to appeal monetary award determinations.

34. Class Counsel will be asked to provide assistance to unrepresented Class Members and to represented Class Members' individually-retained counsel. Because Class Counsel will gain experience in the appeal process over time, their assistance will be essential to Class Members who will face counsel for the NFL Parties on the opposing side. Under Section 9.7(c) of the Settlement Agreement, Co-Lead Class Counsel also have the authority to make formal submissions in support of appeals taken by Class Members. As with their authority to file appeals, exercise of this authority will help to establish a decisional body that will facilitate the delivery of benefits to the Class. Conversely, Co-Lead Class Counsel also have the authority to oppose appeals of awards made to Class Members that the NFL may take, which is as important to protecting the rights of Class Members as much as the appeals taken on Class Members' behalf.

35. Moreover, Class Counsel must continue to monitor the funds and ensure that the NFL Parties comply with the funding and maintenance of targeted reserves for the MAF and BAP, as well as monitoring the Settlement Trust and the Trustee, under Article 23 of the Settlement Agreement.

36. Auditing procedures must be established to ensure that all work done by the various parties engaged in the Settlement Program for the benefit of the Class Members is done with efficiency and professionalism. The sheer scope of the activities and participants, including each member of the physician networks, will demand significant time to perform the auditing functions. Because it is anticipated that the NFL Parties will be engaging in such audits, it is important also to have Class Counsel involved.

37. Inevitably, physicians who have been selected to serve in the various roles will need to be replaced, whether for reasons of retirement, disability, death, or simply because they decide they no longer wish to participate in the Settlement Program. The vetting and selection of

replacement physicians is common benefit work that will need to be repeated hundreds of times over the 65-year life of the Settlement. Class Counsel already have gained experience in this process, which will allow physicians to be replaced quickly as they exit the Program.

38. Finally, the Settlement Agreement requires that the Settling Parties revisit the science every ten years to discuss in good faith possible prospective modifications to the definitions of the Qualifying Diagnoses or the protocols for making Qualifying Diagnoses (or both), in light of generally accepted advances in medical science. Settlement Agreement § 6.6. This will require Class Counsel to independently consult with medical and scientific experts to keep abreast of developments in medicine and science.

39. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of April, 2017.

*/s/ Christopher A. Seeger*

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CHRISTOPHER A. SEEGER  
Co-Lead Class Counsel

# Exhibit Z









# Exhibit 1

**IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY  
LITIGATION**

**THE BRAD SOHN LAW FIRM, PLLC**

**No. 12-md-2323-AB**

# LODESTAR REPORT

### Inception through July 15, 2016

NAME	HOURS	HOURLY RATE	AMOUNT
BRADFORD R. SOHN, ESQ.	50.0	\$525.00	\$26,250.00
TOTAL	50.0	\$525.00	\$26,250.00

# Exhibit 2

**Bradford Rothwell Sohn, Esq.** represents individuals, businesses, and plaintiff classes in litigation matters. His practice focuses on catastrophic injury and wrongful death, commercial, and complex litigation in state and federal courts throughout the United States with a entire career entirely devoted to representing “the little guy.” Brad received his A.B. degree *cum laude* from Harvard University and his J.D., *cum laude* from the University of Miami School of Law. In 2016 alone, Brad’s nationwide single-plaintiff (e.g. non-consolidated, non-aggregate settlement) wrongful death, medical malpractice, and products liability settlements exceeded ten million dollars for his clients. Big Tobacco’s \$100,000,000 global settlement (In re Engle Progeny Cases, M.D. Fla.) in early 2015 was also achieved, in part, through Brad’s individual contributions.

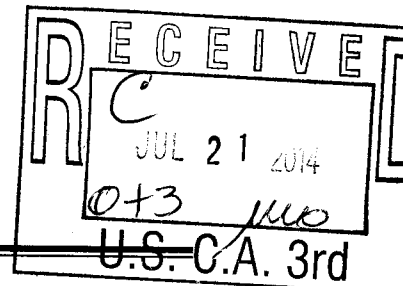
Brad’s ongoing notable representations a “bellweather” case in the New Jersey pelvic mesh litigation, a medical malpractice matter involving a high net worth individual with wage losses exceeding \$16,000,000, several class action matters, a Ford Explorer rollover case, and the continued representation of retired NFL football players (*In re NFL Players’ Concussion Injury Litigation*, MDL No. 2323). Brad has spent significant time devoted to the representation of catastrophically injured athletes and is one of few attorneys who have already recovered millions of dollars for NFL retirees. He has defeated robust labor defenses including 301/labor-preemption multiple times as well as workers’ compensation exclusivity.

Brad has also performed common benefit work for MDL-2541 (In Re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation) where a proposed class of all current and former recipients of athletic grants-in-aid (scholarships) seeks damages for, and an injunction from the NCAA’s alleged violation of antitrust law for failing to compensate college football and basketball scholarship athletes.

As an active member of bar and community associations, Brad has served by appointment on committees for the American Association for Justice, as an alumni interviewer for Harvard University for the past 10 years, and sits on the national advisory board for a non-profit organization dedicated to advancing the study, treatment, and prevention of the effects of brain trauma in athletes and other at-risk groups. Prior to starting The Brad Sohn Law Firm, Brad learned and practiced with several of the nation’s top plaintiffs’-side complex litigation and personal injury firms. A former college football player at Duke and Harvard, Brad’s experiences in this regard have led him to a unique sports niche within his practice.

# Exhibit AA

No. 14- 8103



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IN THE  
**United States Court of Appeals**  
**FOR THE THIRD CIRCUIT**

IN RE NATIONAL FOOTBALL LEAGUE PLAYERS  
CONCUSSION INJURY LITIGATION

On Petition to Appeal from an Order of the  
Eastern District of Pennsylvania Granting Settlement Class Certification  
2:12-md-2323-AB (E.D. Pa.)

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**PETITION OF OBJECTING CLASS MEMBERS PURSUANT TO  
FED. R. CIV. P. 23(f) FOR LEAVE TO APPEAL FROM THE DISTRICT  
COURT'S ORDER GRANTING SETTLEMENT CLASS CERTIFICATION**

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## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
JURISDICTION AND RELIEF SOUGHT .....	3
ISSUE PRESENTED .....	3
FACTUAL BACKGROUND .....	4
I. The Litigation .....	4
II. The Settlement .....	4
III. The Petitioners .....	7
ARGUMENT .....	8
I. The Multiple Conflicts Within the Class Deprive Many Class Members of Adequate Representation and Support Review Now .....	9
A. Failure To Compensate Some Injured Class Members, While Compensating Others, Creates a Conflict .....	10
B. The 75% Offsets Create a Conflict .....	14
C. Failure To Credit Seasons Played in NFL Europe Creates a Conflict .....	15
II. Other Deficiencies in the Settlement Support Review Now .....	16
III. The Impact of Delay on Injured Class Members Supports Review Now .....	18

CONCLUSION.....20

## TABLE OF AUTHORITIES

Page(s)

### CASES

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	9, 13, 14, 16
<i>Bell Atl. Corp. v. Bolger</i> , 2 F.3d 1304 (3d Cir. 1993) .....	17
<i>In re Bluetooth Headset Prods. Liab. Litig.</i> , 654 F.3d 935 (9th Cir. 2011).....	18
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<i>Eubank v. Pella Corp.</i> , ___ F.3d ___, 2014 WL 2444388 (7th Cir. June 2, 2014) .....	17
<i>In re Fed. Skywalk Cases</i> , 680 F.2d 1175 (8th Cir. 1982).....	3
<i>In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.</i> , 55 F.3d 768 (3d Cir. 1995) .....	9, 10, 17
<i>Lienhart v. Dryvit Sys., Inc.</i> , 255 F.3d 138 (4th Cir. 2001) .....	2, 8
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<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	16
<i>Rodriguez v. Nat’l City Bank</i> , 726 F.3d 372 (3d Cir. 2013).....	1

### STATUTES AND RULES

28 U.S.C. § 1292(a)(1) .....	3
28 U.S.C. § 1292(e).....	3
Fed. R. App. P. 5 .....	3

Fed. R. Civ. P. 23(a)(4).....	1, 6
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## INTRODUCTION

This is a petition by seven retired NFL players seeking review of the district court’s decision certifying a class in the course of preliminarily approving a settlement in the “NFL Concussion Litigation.”

The class fails to meet Rule 23’s requirement that “the representative parties will fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(a)(4). Multiple conflicts within the class leave many class members without adequate representation. For example, the estate of a class member who died with CTE – likely the most prevalent medical condition suffered by the class – before preliminary approval would receive up to \$4 million, while a class member who dies with CTE after preliminary approval receives nothing.<sup>1</sup> Yet both give Defendants a near-absolute release.

This Court has “‘very broad discretion in deciding whether to grant permission to pursue a Rule 23(f) appeal.’” *Rodriguez v. Nat’l City Bank*, 726 F.3d 372, 376 (3d Cir. 2013). A recognized reason for doing so is “when the district court’s class certification determination was erroneous.” *Id.* at 377.

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<sup>1</sup> CTE, or chronic traumatic encephalopathy, is likely the most common neurocognitive injury suffered by class members. It “is a progressive degenerative disease of the brain found in athletes . . . with a history of repetitive brain trauma” that is “associated with memory loss, confusion, impaired judgment, impulse control problems, aggression, [and] depression.” BU CTE Center, *What Is CTE?*, <http://www.bu.edu/cte/about/what-is-cte/>. CTE can lead to suicide.

Review at this stage is particularly “‘appropriate when it promises to spare the parties and the district court the expense and burden of litigating the matter to final judgment only to have it inevitably reversed’” on appeal. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001).

That is precisely why we seek review. The class, as certified, is doomed. Additionally, the notice is materially false and the claims process is improperly complex and exclusionary – in violation of due process. Rather than incur the substantial expense and inevitable delay of a fairness hearing and ensuing opinion, we ask that those problems be addressed now.

Unfortunately, for many of the more than 20,000 class members, time is of the essence. Some will die – from the injuries that are at the root of this litigation – as this process plays out. Others will see their medical conditions worsen. In the meantime, individual suits are stayed and this case will likely be delayed by over a year while a settlement marred by a fatally flawed class, as well as other defects, winds its way through the system.

The district judge, in an order allowing the parties to announce the terms of the settlement last summer, stated that “from the outset of this litigation, I have expressed my belief that the interests of all parties would be best served by a negotiated resolution of this case.” Dkt. No. 5235. We agree. But the resolution must comport with the requirements of Rule 23 and treat all class members fairly.



And, respectfully, it should be one reached as expeditiously and efficiently as possible, given the stakes for the members of the class.

### **JURISDICTION AND RELIEF SOUGHT**

Pursuant to Fed. R. Civ. P. 23(f), Fed. R. App. P. 5, and 28 U.S.C. § 1292(e), Petitioners respectfully petition for leave to appeal from the July 7, 2014 Order and Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania (Brody, J.), No. 12-md-2323 (attached as Exhibits A and B), certifying a settlement class and granting preliminary approval to the class settlement negotiated by Class Counsel and the NFL Defendants.<sup>2</sup> This petition is timely filed. *See* Fed. R. Civ. P. 23(f).<sup>3</sup>

### **ISSUE PRESENTED**

Whether the Court should exercise its broad discretion to review the district court's class certification order where multiple conflicts deprive many class members of adequate representation, and numerous other factors, including the substantially declining health of many in the class, call for review without delay.

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<sup>2</sup> Review is appropriate at this stage because Rule 23(f) authorizes review from any "order granting or denying class-action certification." Fed. R. Civ. P. 23(f). Indeed, the Advisory Committee explained that even a "tentative" certification decision can be reviewed under Rule 23(f) and 28 U.S.C. § 1292(e). Fed. R. Civ. P. 23(f), 1998 Advisory Comm. cmt.

<sup>3</sup> Additionally, because the district court enjoined related lawsuits, Order, Ex. A at 8, this Court could exercise appellate jurisdiction under 28 U.S.C. § 1292(a)(1). *See In re Fed. Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir. 1982).

## **FACTUAL BACKGROUND**

### **I. THE LITIGATION**

In 2011, retired football players began suing the National Football League (“NFL”) to recover for neurocognitive injuries resulting from repeated mild traumatic brain impacts (“MTBI”) sustained during their NFL careers. Those lawsuits alleged that the NFL knowingly misled players by denying the connection between neurocognitive injury and MTBI and by sponsoring “junk” science that supported those misrepresentations. Objection, Ex. C at 7-8.

The cases were consolidated in the Eastern District of Pennsylvania. *See* Dkt. No. 1. On April 26, 2012, the district court appointed Co-Lead Counsel, the Executive Committee, and the Plaintiffs’ Steering Committee. Dkt. No. 64. The NFL Defendants moved to dismiss, and the district court heard argument on that motion on April 9, 2013. Dkt. Nos. 4737, 4738. Without ruling on the motion, the district court ordered the parties to mediation. Dkt. No. 5128.

### **II. THE SETTLEMENT**

On August 29, 2013, the district court announced that the mediation had resulted in settlement, Dkt. No. 5235, and the mediator issued a press release outlining its basic terms, Objection, Ex. C at 11-12. The settlement was to provide a \$10 million education fund, a \$75 million fund to assess class members’ neurocognitive functioning, and a \$675 million monetary award fund to compensate “severe cognitive impairment, dementia, Alzheimer’s, [and] ALS.” *Id.* at 12-13.

Five months later, Class Counsel for the first time disclosed the full settlement agreement and moved for preliminary approval. Dkt. No. 5634. The settlement compensated ALS, Alzheimer's, Parkinson's, and moderate and severe dementia. Objection, Ex. C at 12. It did not, by contrast, compensate cases of CTE – unless the retired player died before preliminary approval of the settlement. *Id.* at 12-13.

Class Counsel requested certification of a settlement class consisting of all living, retired NFL Football Players who left the NFL before preliminary approval of the settlement, and the representatives of deceased retired players. Objection, Ex. C at 5-6. The class also includes players in the NFL's predecessor leagues as well as players in NFL Europa and its predecessor leagues (collectively, "NFL Europe"). *Id.*

The proposed class was divided into two sub-classes. Subclass 1 consisted of all retired players who were not diagnosed with a compensable disease before preliminary approval; Subclass 2 consisted of retired players who have received such a diagnosis. Objection, Ex. C at 6. Shawn Wooden, the Representative Plaintiff for Sub-Class 1, "has not been diagnosed with any neurocognitive impairment." *Id.* He pleads an "increased risk of developing dementia, Alzheimer's, Parkinson's, or ALS," but no increased risk of developing CTE. *Id.* Kevin Turner, who was diagnosed with ALS in 2010, represents Sub-Class 2. *Id.* at 6-7.

On January 14, 2014, the district court denied the motion for preliminary approval. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014). The court was "concerned that not all Retired NFL Football Players who ultimately receive a Qualifying Diagnosis . . . will be paid." *Id.* at 715. Accordingly, it ordered the settling parties to provide actuarial and economic studies supporting the sufficiency of the fund. *Id.* at 716.

Six months later, on June 25, 2014, Class Counsel submitted a revised settlement and renewed their motion for preliminary approval. *See* Dkt. No. 6073. The revised settlement purported to address the district court's initial concerns by lifting the \$675 million cap on the monetary award fund. Objection, Ex. C at 15. The payment levels and the qualifying diagnoses, however, remained the same. *Id.*

One week later, Petitioners objected to the settlement and opposed the motion for preliminary approval. They argued, among other things, that intra-class conflicts precluded certification under Rule 23(a)(4). Objection, Ex. C at 19-29. Most notably, class members suffering from CTE would receive no compensation after preliminary approval but those who died before approval would receive up to \$4 million. *Id.* at 20-26. Petitioners also challenged the proposed notice because it falsely indicated that the settlement compensated future CTE. *Id.* at 29-32. And Petitioners objected to the labyrinth of procedural requirements for obtaining relief, which will likely prevent many class members from recovering. *Id.* at 32-35.

On July 7, 2014, the district court – incorrectly characterizing the motion for preliminary approval as “unopposed,” Opinion, Ex. B at 1 – certified the settlement class and granted preliminary approval to the settlement. Order, Ex. A; Opinion, Ex. B. Significantly, the court did not address any of Petitioners’ objections – including Petitioners’ argument that class representation was inadequate because the settlement created intra-class conflicts by arbitrarily distinguishing among similarly situated class members. *See* Opinion, Ex. B at 15-16.

### III. THE PETITIONERS

Sean Morey, Alan Faneca, Ben Hamilton, Robert Royal, Roderick Cartwright, Jeff Rohrer, and Sean Considine are all class members and NFL veterans; one also played in NFL Europe. They played, on average, eight years in the league, and most received NFL-administered injections of Toradol, a pain-killer. They are collegiate All-Americans, team captains, Pro-Bowlers, and Super Bowl Champions. Objection, Ex. C at 2-5. Since leaving the NFL, each has experienced one or more of a wide range of symptoms linked to MTBI, none of which receives compensation or treatment under the settlement. Among others, those conditions include chronic pain, executive function deficit, episodic depression, sleep dysfunction, and memory deficits. Those conditions have been identified as symptoms of CTE. A.C. McKee *et al.*, *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 *Brain: A Journal of Neurology* 43, 52, 55-59 (2012).

Petitioners sought leave to intervene on May 5, 2014. Dkt. No. 6019-1. They argued intervention was necessary because their interests were not adequately represented in the then-ongoing settlement negotiations. *Id.* at 13-20. Significantly, in making that showing, Petitioners raised the same class conflicts described in their objection. *Compare id.* at 14-19 with Objection, Ex. C at 19-29. The district court has not ruled on that motion.

### **ARGUMENT**

Federal Rule of Civil Procedure 23(f) authorizes circuit courts to hear “an appeal from an order granting or denying class-action certification.” Fed. R. Civ. P. 23(f). Review may be granted ““on the basis of any consideration that the court of appeals finds persuasive,”” including an “erroneous” certification ruling. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) (quoting Comm. Note, Fed. R. Civ. P. 23(f)) (granting petition for appeal). Rule 23(f) provides a vehicle for addressing problems with class certification promptly, to avoid unnecessary expense and delay. The Rule “promote[s] judicial economy by enabling the correction of certain manifestly flawed class certifications.” *Lienhart*, 255 F.3d at 145 (4th Cir. 2001) (granting Rule 23(f) petition where class certification was erroneous). This Court should use that vehicle to address the problems with the settlement class here.

**I. THE MULTIPLE CONFLICTS WITHIN THE CLASS DEPRIVE MANY CLASS MEMBERS OF ADEQUATE REPRESENTATION AND SUPPORT REVIEW NOW**

The district court’s certification order here was erroneous. The Representative Plaintiffs were not adequate representatives of the class because they entered into a settlement that compensated the MTBI-related conditions afflicting them but bargained away the recovery of many other class members.

The central premise of class litigation is that class representatives and their counsel adequately represent a broader group of similarly situated people. The “linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.” *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183, 187-88 (3d Cir. 2012) (denying certification where interests of representative plaintiffs and absent class members diverged). Thus, “adversity among subgroups” requires denial of class certification. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (denying class certification where conflict existed between present and future claimants).

When certifying a settlement class, the court must “focus on the settlement’s distribution terms . . . to detect situations where some class members’ interests diverge from those of others in the class.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir. 1995) (finding representation inadequate where settlement terms preferred some class members over others). Thus, “a settlement that offers considerably more value to one class of plaintiffs

than to another may be trading the claims of the latter group away in order to enrich the former group.” *Id.* “Offer[ing] considerably more value to one class of plaintiffs” is precisely what the settlement does here.

As to Petitioners, the settlement suffers from at least three intra-class conflicts that preclude certification:

- The settlement arbitrarily limits compensation for CTE – a disease that neither Representative Plaintiff claims a risk of developing – to individuals who died before preliminary approval. Class members whose CTE is diagnosed in the future will receive nothing. The settlement also does not compensate Petitioners’ MTBI-related afflictions, many of which are potential indicators of CTE, and none of which the Representative Plaintiffs claim to suffer.
- The settlement reduces a claimant’s award by 75% if (i) the claimant has suffered a stroke, even though the NFL Defendants’ own conduct in administering Toradol increased some Petitioners’ risk of stroke, or (ii) the claimant has suffered a *single* non-football-related traumatic brain injury (“TBI”), even though class members received *dozens* of TBIs while playing in the NFL.
- The settlement class includes NFL Europe veterans, but the settlement does not credit seasons played there.

These conflicts, individually and collectively, render certification erroneous.

**A. Failure To Compensate Some Injured Class Members, While Compensating Others, Creates a Conflict**

The settlement compensates only a small subset of MTBI-related injuries to the exclusion of all others, creating conflict between the interests of those who suffer from compensated injuries and those whose injuries go without relief. Petitioners suffer from a range of significant MTBI-related medical conditions:



visuospatial difficulties, executive function deficit, chronic headaches, dysnomia, decreased emotional stability, increased impulsivity, and attention and concentration deficits. Objection, Ex. C at 5. None of these conditions receives compensation or medical treatment under the settlement.

The disparate – and arbitrary – treatment of class members suffering from these uncompensated afflictions is particularly stark in light of the settlement’s framework for compensating CTE. The uncompensated conditions afflicting Petitioners are among the well-documented symptoms consistent with CTE. McKee, *supra*, at 60. And while CTE found in a retired player who died on July 6, 2014 calls for a \$4 million payment under the settlement, that same condition goes uncompensated if the player dies one day later. That is because the settlement defines “qualifying diagnosis” to include “a post-mortem diagnosis of CTE” *only* “[f]or Retired NFL Football Players who died prior to the date of the Preliminary Approval and Class Certification Order.” Settlement, Ex. D at Ex. B-1 ¶ 5; *see also id.* ¶¶ 2.1(yyy), 6.3(a). Thus, former players who have CTE symptoms and develop CTE in the future receive nothing.

That limitation on CTE compensation is remarkable. Given that 33 of the 34 deceased NFL players whose brains have been examined for CTE have been diagnosed with the condition, one of the lead CTE researchers has wondered whether “every single football player doesn’t have” CTE. Frontline, Transcript of

*League of Denial: The NFL's Concussion Crisis*, <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/transcript-50/>.<sup>4</sup> CTE is to concussion litigation what asbestosis is to asbestos litigation. Nonetheless, the settlement provides *no compensation* to players with CTE who die after preliminary approval of the settlement. Thus, the CTE limitation will dramatically limit the amount Defendants will pay to class members who are giving them essentially a blanket release.

The consequences will multiply over time. As science advances, it is likely that MTBI will be shown to correlate with additional diseases, and that CTE will be more easily detectable before death.<sup>5</sup> Yet the settlement provides no flexibility for adding to the list of qualifying diseases, compensating new conditions, or compensating pre-death diagnoses of CTE. *See* Settlement, Ex. D § 6.6(c) (“In no event will modifications be made to the Monetary Award levels in the Monetary

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<sup>4</sup> By contrast, one study examining NFL retirees who played at least five seasons between 1959 and 1988 recorded seven cases of ALS, seven cases of Alzheimer’s, and three cases of Parkinson’s in 3,439 retired players. Nat’l Inst. for Occupational Safety and Health, *Brain and Nervous System Disorders Among NFL Players* (Jan. 2013), [http://www.cdc.gov/niosh/pgms/worknotify/pdfs/NFL\\_Notification\\_02.pdf](http://www.cdc.gov/niosh/pgms/worknotify/pdfs/NFL_Notification_02.pdf).

<sup>5</sup> *See, e.g.*, Dan McGrath, *Illinois Eye Institute Project Aims to Identify CTE in the Living*, Chicago Sun-Times (June 14, 2014 4:35 PM), <http://www.suntimes.com/sports/28048920-419/illinois-eye-institute-project-aims-to-identify-cte-in-the-living.html#.U8noDvldVqU>. Indeed, a 2013 brain scan of Hall of Fame running back Tony Dorsett showed that “he has signs of chronic encephalopathy.” Cindy Boren, *Tony Dorsett Diagnosed with Signs of CTE*, The Washington Post (Nov. 7, 2013), <http://www.washingtonpost.com/blogs/early-lead/wp/2013/11/07/tony-dorsett-diagnosed-with-signs-of-cte/>.

Award Grid, except for inflation adjustment(s).”).

Class members are entitled to representatives who would press for settlement “provisions that can keep pace with changing science and medicine, rather than freezing in place the science” known at the time of settlement. *Amchem*, 521 U.S. at 610-11. But the Representative Plaintiffs cannot fulfill that role. Neither Representative Plaintiff shares Petitioners’ interest in securing compensation for all cases of CTE and other MTBI-related conditions. Mr. Turner, who suffers from ALS, has a diagnosed medical condition that specifically entitles him to compensation under the settlement (and rightly so). But he was not poised to represent the interests of those who have suffered different injuries and receive nothing under the settlement. Neither is Mr. Wooden.

Petitioners exhibit MTBI-related injuries that are clinical indications of CTE. Mr. Wooden, by contrast, has not alleged that he suffers from any MTBI-related affliction. Nor has he alleged that he is at “[an] increased risk of developing” CTE, despite alleging an increased risk for dementia, Alzheimer’s Disease, Parkinson’s Disease, and ALS. Objection, Ex. C at 24. Mr. Wooden’s interests therefore lie in securing future compensation for those afflictions, not in securing payment for the Petitioners’ conditions and for future cases of CTE. For that reason, the subclasses do not ensure adequate representation. They do not

“align[] [the] interests and incentives [of] the representative plaintiffs and the rest of the class.” *Dewey*, 681 F.3d at 183; *see also Amchem*, 521 U.S. at 625-26.

### **B. The 75% Offsets Create a Conflict**

The proposed settlement also imposes offsets that create an additional class conflict. It reduces a claimant’s award by 75% for a single instance of non-football-related TBI or stroke. Settlement, Ex. D §6.7(b)(ii)-(iii). That 75% offset applies regardless of the severity of traumatic brain injury that the player sustained while playing football. And it presumes that a single non-football-related instance of TBI accounts for 75% of a player’s MTBI-related injuries, even though that player may have sustained numerous head traumas throughout his NFL career. That is both devoid of scientific justification and grossly unfair.

Instances of stroke, moreover, should be compensated injuries, not offsets that reduce recovery. *The NFL itself has increased the risk of stroke* by widely and for many years administering the pain-killer Toradol without informed consent. Toradol injections increased that risk in two ways. First, Toradol masks symptoms of brain injury, encouraging players’ continued participation and thereby increasing the risk of repeat MTBIs in the same game. Second, MTBI suffered after a Toradol injection occurs at a time when the cerebrovascular architecture of the brain is particularly weak as a result of the head traumas suffered during the game. *See Objection*, Ex. C at 26-27.

Consequently, large groups of players who received weekly Toradol injections suffered repetitive MTBI at a time when their brains were most susceptible to permanent damage and injury. That damage itself enhances a retired player's risk of experiencing a stroke later in life. See James F. Burke *et al.*, *Traumatic Brain Injury May Be an Independent Risk Factor for Stroke*, 81 *Neurology* 1 (2013). Thus, the NFL's own actions have contributed to the prevalence of stroke among retired players. Class Counsel knew of these allegations, pleading them in other complaints. *E.g.*, Complaint, *Finn v. Nat'l Football League*, No. 2:11-cv-7067, ¶¶ 135-143 (D.N.J. Dec. 8, 2011). But the settlement makes no mention of these injuries except to release any claims for them and to inexplicably select them as bases for reducing the retired player's compensation.

Representative Plaintiffs could not adequately represent Petitioners' interests in eliminating the offset related to stroke and post-NFL TBI. Neither Mr. Turner nor Mr. Wooden claims an increased risk of stroke through NFL-administered Toradol use. Neither can adequately represent those class members who some day may suffer such a stroke – and the resulting drop in compensation under the proposed settlement – as a result of the NFL's own conduct.

### **C. Failure To Credit Seasons Played in NFL Europe Creates a Conflict**

The settlement, while releasing all claims of NFL Europe players, does not award "Eligible Season" credit for time spent playing in that league. Settlement,

Ex. D §6.7(c)(i). Thus, a class member who played five years in the NFL will receive a larger settlement award than a class member who played part of his five-year career in NFL Europe. That is true even though players in NFL Europe endured the same playing conditions and sustained repeated MTBIs, just like players in the NFL. Neither Mr. Turner nor Mr. Wooden alleges that he played in NFL Europe. Thus, neither adequately represents the interests of players who did.

\* \* \* \* \*

Distinct groups within the proposed class had their rights bargained away without representation. Where “the interests of the representative plaintiffs and the interests of [absentee class members] align[] in opposing directions,” class representation is inadequate. *Dewey*, 681 F.3d at 188; *see also Amchem*, 521 U.S. at 627 (denying class certification where settlement not agreed to by representatives of all sub-classes); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (intra-class conflict “require[d] division into homogenous subclasses ... with separate representation to eliminate conflicting interests”). The district court’s decision to certify the settlement class over these conflicts was erroneous.

## **II. OTHER DEFICIENCIES IN THE SETTLEMENT SUPPORT REVIEW NOW**

Beyond the inadequate class representation, the settlement contains other defects – some raising due process concerns – as well. These defects serve as other considerations this Court should find persuasive in deciding to grant review.

See *Newton*, 259 F.3d at 165 (review may be granted “‘on the basis of any consideration that the court of appeals finds persuasive’”).

**First**, the class notice – already being distributed – is false. “To satisfy due process,” notice to class members “‘must be sufficiently informative and give sufficient opportunity for response.’” *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1317 (3d Cir. 1993). The long-form notice identifies “Death with CTE” among the “diagnoses [that] qualify for monetary awards” and states that such a diagnosis “may occur *at any time* until the end of the 65-year term of the Monetary Award Fund.” Settlement, Ex. D at Ex. B-5. That is false: The settlement precludes compensation for future CTE. Without knowing the settlement’s limits, class members cannot make an informed decision to remain in the class or opt out. Such notice is not “sufficiently informative.” *Bolger*, 2 F.3d at 1317.<sup>6</sup>

**Second**, the settlement establishes a byzantine maze of procedural requirements that “strews obstacles in the path of” class members – many of whom suffer from significant cognitive impairment – seeking recovery. *Eubank v. Pella Corp.*, \_\_\_ F.3d \_\_\_, 2014 WL 2444388, at \*7 (7th Cir. June 2, 2014) (rejecting settlement because of, among other things, a complex claim process). For

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<sup>6</sup> The defective notice is doubly problematic in the settlement class context, where “mere presentation of the settlement notice with the class notice may pressure even skeptical class members to accept the settlement out of the belief that ... they really have no choice.” *GM Trucks*, 55 F.3d at 789.

example, class members must register with the claims administrator within 180 days of posting of registration deadlines on the settlement website to receive any benefit. Objection, Ex. C at 32. An unregistered class member who is later diagnosed with a qualifying disease is ineligible for benefits. The settlement also requires submission of an as-yet undisclosed claim form and authorizes the Claims Administrator to request additional documentation from claimants. *Id.* at 33. The NFL, moreover, has every incentive to appeal claim awards. The settlement places no limits on the number of claims the NFL may appeal, imposes no appeal fee, and does not require the NFL to pay costs and fees if it loses. *Id.* Class members, by contrast, must pay a \$1,000 fee to appeal. *Id.*

**Third**, Class Counsel negotiated a nine-figure attorneys' fee – \$112.5 million plus the potential for 5% of the awards to class members – while doing very little work. *No discovery* occurred and there was no motions practice beyond a motion to dismiss. Moreover, the NFL Defendants have agreed not to oppose the fee petition. These circumstances “increase[] the likelihood that class counsel . . . bargained away something of value” to further their own interests. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011).

### **III. THE IMPACT OF DELAY ON INJURED CLASS MEMBERS SUPPORTS REVIEW NOW**

The serious, deteriorating medical conditions of many class members is another consideration this Court should find “persuasive” in deciding to grant



review. *See Newton*, 259 F.3d at 165 (review may be granted “‘on the basis of any consideration that the court of appeals finds persuasive’”).

The diseases suffered by the class members are degenerative and decline can be rapid, particularly if diagnosis and medical intervention are delayed.<sup>7</sup> One study found that the median survival from the time of an ALS diagnosis is just 1.4 years.<sup>8</sup> Another estimated survival after the onset of dementia at 4.1 years.<sup>9</sup>

The effects of undiagnosed CTE and other neurocognitive diseases can be extraordinary. In two highly publicized cases, retired NFL stars committed suicide – shooting themselves in the heart to preserve their brains for research – after experiencing severe symptoms of CTE and seeing their lives degenerate.<sup>10</sup> And

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<sup>7</sup> *See, e.g., Bennett P. Leifer, Early Diagnosis of Alzheimer’s Disease: Clinical and Economic Benefits*, 51 J. of the Am. Geriatrics Soc’y S281, S285 (2003).

<sup>8</sup> E.S. Louwerse *et al.*, *Amyotrophic Lateral Sclerosis: Mortality Risk During the Course of the Disease and Prognostic Factors*, 152 J. of Neurological Sci. Suppl. S10, S12 (1997).

<sup>9</sup> Jing Xie *et al.*, *Survival Times in People with Dementia: Analysis from Population Based Cohort Study with 14 Year Follow-Up*, BMJ Online First, at 6 (Nov. 11, 2007).

<sup>10</sup> Nathaniel Penn, *The Violent Life and Sudden Death of Junior Seau*, GQ Magazine (Sept. 2013), <http://www.gq.com/entertainment/sports/201309/junior-seau-nfl-death-concussions-brain-injury>; Paul Solotaroff, *Dave Duerson: The Ferocious Life and Tragic Death of a Super Bowl Star*, Men’s Journal (May 2011), <http://www.mensjournal.com/magazine/dave-duerson-the-ferocious-life-and-tragic-death-of-a-super-bowl-star-20121002>.

the Hall of Fame center on several Pittsburgh Steelers championship teams died with CTE at age 50, after a rapid mental decline that, at times, left him homeless.<sup>11</sup>

Even those fortunate enough to survive through final approval may suffer significant hardship as a result of the delay. The neurocognitive diseases afflicting many class members are expensive to treat. A year of care for a dementia patient alone can cost between \$42,000 and \$56,000.<sup>12</sup> Until the settlement takes effect, class members must carry these costs themselves, a burden that is particularly heavy for the many NFL players who face financial difficulty in retirement.<sup>13</sup>

Thus, delaying review will have a real human cost. To allow the settlement to proceed to a fairness hearing only to have the matter reversed on appeal due to errors that can be addressed now would work a substantial unfairness on the class.

### **CONCLUSION**

This Court should grant review under Rule 23(f).

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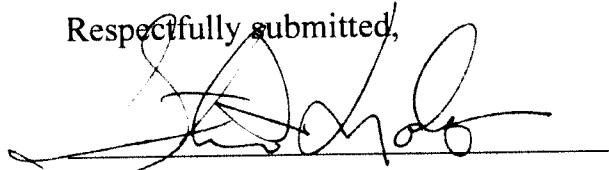
<sup>11</sup> Mark Fainaru-Wada & Steve Fainaru, *League of Denial* 83-105 (2013).

<sup>12</sup> Charles Zorumski & Eugene Rubin, *The Financial Cost of Dementia*, Psychology Today (Oct. 10, 2013), <http://www.psychologytoday.com/blog/demystifying-psychiatry/201310/the-financial-cost-dementia>.

<sup>13</sup> See Pablo S. Torre, *How (and Why) Athletes Go Broke*, Sports Illustrated (Mar. 23, 2009), (noting 78% of former NFL players are under financial strain within two years of retirement), <http://sportsillustrated.cnn.com/vault/2009/03/23/105789480/how-and-why-athletes-go-broke>.

July 21, 2014

Respectfully submitted,



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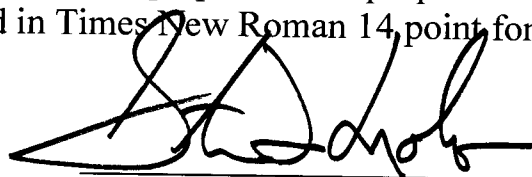
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### **CERTIFICATE OF COMPLIANCE**

1. This petition complies with the page limitation of Fed. R. App. P. 5(c) because it does not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).
  
2. This petition complies with the typeface requirements of Fed. R. App. P. 32(c)(2) and 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

July 21, 2014

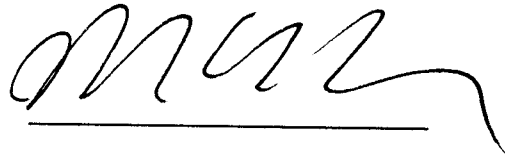
A handwritten signature in black ink, appearing to read "Steven F. Molo", written over a horizontal line.

Steven F. Molo

**CERTIFICATE OF BAR MEMBERSHIP**

I certify, pursuant to Third Circuit Local Appellate Rules 28.3(d) and 46.1(e), that Steven F. Molo, Martin V. Totaro, William T. Hangley and Michele D. Hangley are members in good standing of the Bar of this Court.

July 21, 2014

A handwritten signature in black ink, appearing to read 'M D Hangley', written over a horizontal line.

Michele D. Hangley

**CERTIFICATE OF SERVICE**

I certify that today, July 21, 2014, the original and three copies of the foregoing Petition for Permission to Appeal were filed with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit. I also certify that one copy of the foregoing Petition was served by hand delivery or FedEx overnight delivery and electronic mail as indicated upon each of the following:

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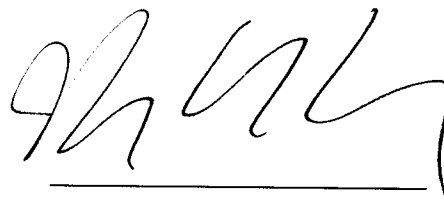
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# Exhibit BB



No. 14-8103

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IN THE  
**United States Court of Appeals**  
FOR THE THIRD CIRCUIT

IN RE NATIONAL FOOTBALL LEAGUE PLAYERS  
CONCUSSION INJURY LITIGATION

On Petition to Appeal from an Order of the  
Eastern District of Pennsylvania Granting Settlement Class Certification  
2:12-md-2323-AB (E.D. Pa.)

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**REPLY IN SUPPORT OF PETITION OF OBJECTING  
CLASS MEMBERS PURSUANT TO FED. R. CIV. P. 23(f)  
FOR LEAVE TO APPEAL FROM THE DISTRICT COURT'S  
ORDER GRANTING SETTLEMENT CLASS CERTIFICATION**

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## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION .....	1
ARGUMENT .....	1
I. This Court Has Jurisdiction To Review the Certification Order.....	1
II. This Court Should Exercise Its Discretion Under Rule 23(f) To Review the Class Certification Order at Issue Here.....	5
A. The District Court’s Certification Order Is Erroneous.....	5
B. Defects in the Settlement Process Require Immediate Review .....	8
C. For Many Class Members, Time Is of the Essence.....	9
CONCLUSION .....	10

## TABLE OF AUTHORITIES

Page(s)

### CASES

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	6
<i>In re Asbestos Sch. Litig.</i> , 46 F.3d 1284 (3d Cir. 1994) .....	5
<i>Dewey v. Volkswagen Aktiengesellschaft</i> , 681 F.3d 170 (3d Cir. 2012) .....	6
<i>Eubank v. Pella Corp.</i> , 753 F.3d 718 (7th Cir. 2014).....	9
<i>In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.</i> , 55 F.3d 768 (3d Cir. 1995) .....	4, 6, 8
<i>Glover v. Standard Fed. Bank</i> , 283 F.3d 953 (8th Cir. 2002) .....	2
<i>Lienhart v. Dryvit Sys., Inc.</i> , 255 F.3d 138 (4th Cir. 2001) .....	1, 5
<i>Liles v. Del Campo</i> , 350 F.3d 742 (8th Cir. 2003) .....	4
<i>Matz v. Household Int’l Tax Reduction Inv. Plan</i> , 687 F.3d 824 (7th Cir. 2012).....	2
<i>Newton v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , 259 F.3d 154 (3d Cir. 2001).....	1, 2, 5, 8

### RULES

Fed. R. Civ. P. 23 .....	2
Fed. R. Civ. P. 23(a).....	3
Fed. R. Civ. P. 23(a)(4).....	4, 6
Fed. R. Civ. P. 23(b) .....	3
Fed. R. Civ. P. 23(c)(1)(C) .....	3
Fed. R. Civ. P. 23(f).....	<i>passim</i>
Fed. R. Civ. P. 23, 2003 Advisory Committee note .....	3

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McKee <i>et al.</i> , <i>The Spectrum of Disease in Chronic Traumatic Encephalopathy</i> , 136 <i>Brain: A Journal of Neurology</i> 43 (2013) .....	7
Civil Rules Advisory Committee, <i>Minutes</i> (May 1-2, 1997), <a href="http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv5-97.htm">http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv5-97.htm</a> .....	2
Prince <i>et al.</i> , <i>World Alzheimer Report 2011: The Benefits of Early Diagnosis and Intervention</i> (2011) .....	9
Rubenstein, <i>Newberg on Class Actions</i> §7:51 (5th ed.) .....	2
Willging <i>et al.</i> , <i>Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules</i> (1996) .....	5
1 <i>Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23</i> (1996) .....	2

## **INTRODUCTION**

Class Counsel and the NFL conflate and confuse the authority controlling whether this Court can and should review the district court's order certifying the settlement class. Five basic points govern the analysis:

- Rule 23(f) states: A “court of appeals may permit an appeal from an order granting or denying class-action certification under this rule.” The word “final” does not appear in the rule.
- Rule 23(f) is intended to afford an opportunity for prompt correction of error to spare the parties significant litigation or settlement costs. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144-45 (4th Cir. 2001).
- This Court has “unfettered discretion” to grant a Rule 23(f) petition. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 163 (3d Cir. 2001) (quotation marks omitted).
- This Court has held that a basis for granting Rule 23(f) review is when the district court's “ruling on class certification [wa]s *likely erroneous*.” *Id.* at 164 (emphasis added).
- In exercising its discretion, this Court may grant review “on the basis of any consideration that [it] finds persuasive.” *Id.* at 165.

The erroneous certification of a conflict-riddled class – along with the other “persuasive considerations” of fundamental defects in the notice and claims process, as well as the deteriorating health of class members – justifies review.

## **ARGUMENT**

### **I. THIS COURT HAS JURISDICTION TO REVIEW THE CERTIFICATION ORDER**

This Court has “unfettered discretion” to grant Rule 23(f) petitions and may do so “on the basis of any consideration that [it] finds persuasive.” *Newton*, 259

F.3d at 163, 165. That “wide latitude,” *id.* at 165, extends to review of a certification order that “is likely erroneous,” *id.* at 164. Other courts similarly apply Rule 23(f) flexibly.<sup>1</sup> This approach reflects the intent of the Rule’s drafters, who “removed” passages “predicting that permission to appeal would be granted with restraint.” Civil Rules Advisory Committee, *Minutes* (May 1-2, 1997), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv5-97.htm>. The drafters also noted that “early review is desirable.” 1 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23*, at 272 (1997).

Nonetheless, Class Counsel contend that, “[p]lain and simple, there is no jurisdictional basis” for the petition. Class Opp. 1. The NFL echoes that contention, arguing that the “certification order issued by the district court was expressly based on a ‘preliminary’ review of the requirements under Rule 23.” NFL Opp. 10. Yet, the NFL and Class Counsel cite *no case* holding that courts of appeals lack jurisdiction under Rule 23(f) over a “preliminary” certification order.

Rule 23 draws no distinction among different class certification orders. “Preliminary” class certification is nowhere in the Rule’s text. Rather, Rule 23

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<sup>1</sup> See, e.g., *Matz v. Household Int’l Tax Reduction Inv. Plan*, 687 F.3d 824, 826 (7th Cir. 2012) (order amending scope of class reviewable under Rule 23(f)); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 958-59 (8th Cir. 2002) (granting petition where order added class members to an already-certified class). Rather than adopting respondents’ rigid approach, “courts have allowed some flexibility in appealable orders where they have been convinced that significant changes were still being made to the class.” Rubenstein, *Newberg on Class Actions* § 7:51 (5th ed.).

speaks only of “class certification” and identifies certain “prerequisites” that must be met to obtain class certification. *See* Fed. R. Civ. P. 23(a)-(b). “A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.” Fed. R. Civ. P. 23, 2003 Advisory Committee note. Thus, the district court has ruled that Rule 23’s requirements have been met.

The NFL concedes that *every* “order that grants or denies class certification may be altered or amended before final judgment.” NFL Opp. 12; *see* Fed. R. Civ. P. 23(c)(1)(C). But it argues that review now would “threaten[] to create a circumstance where the district court’s final decision moots this court’s appellate review.” NFL Opp. 11. This argument makes no sense. Given that every order granting or denying certification may be altered or amended prior to final judgment, there is always the possibility that a district court might later “moot” appellate review.<sup>2</sup>

Further, contrary to respondents’ contention, immediate review does not require this Court to act as an appellate factfinder. Class Opp. 3, 7; NFL Opp. 10-

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<sup>2</sup> Class Counsel – but not the NFL – speculate that the Advisory Committee’s 1998 statement that “tentative” certifications are reviewable is no longer accurate because “conditional” certifications were eliminated in 2003. Class Opp. 7-8. But they offer no reason why “tentative” and “conditional” should be conflated. Rather, the Advisory Committee’s reference to “tentative” certifications is merely an acknowledgement that all certifications are tentative because every “order that grants or denies class certification may be altered or amended before final judgment.” Fed. R. Civ. P. 23(c)(1)(C). If the deletion of “conditional” class certification was intended to eliminate interlocutory appeal of tentative certification decisions, the 2003 amendment notes would have expressly stated that.



11. Petitioners have challenged the structure of the class based on the lack of adequate representation – one of the four requirements for certification. Fed. R. Civ. P. 23(a)(4). This Court must “focus on the settlement’s distribution terms . . . to detect situations where some class members’ interests diverge from those of others in the class.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir. 1995). Those terms are already before this Court. The district court made the factual finding – over the objection of petitioners – that “the interests of all Settlement Class Members” are “protected.” Pet. Ex. B at 15.<sup>3</sup>

Respondents also invoke *Liles v. Del Campo*, 350 F.3d 742 (8th Cir. 2003). Class Opp. 12-13; NFL Opp. 17-18. But that case supports petitioners. The Eighth Circuit ***did not*** rule that it had no jurisdiction. Rather, it declined to exercise its discretion to grant the petition. In doing so, it emphasized that settlement claims were to be paid from a fund that also covered litigation costs. 350 F.3d at 745. Thus, interlocutory review would “jeopardize the limited assets available for resolving the claims.” *Id.* at 745-46. Here, by contrast, no such limits exist, and interlocutory review will expedite the cure of the fatal flaws in the class structure.

The fundamental purpose of Rule 23(f) is to allow a court of appeals to

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<sup>3</sup> Petitioners raised the conflicts within the class twice before the district court – first in their motion to intervene (that was denied after petitioners sought leave to appeal) and then in their objection to preliminary approval. Nothing suggests the third time will be the charm and the district court will change its view absent direction from this Court.

address a problem with certification in an efficient, timely manner. *See Lienhart*, 255 F.3d at 145; Willging *et al.*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 80 (1996) (Rule 23(f) “is intended to afford an opportunity to prompt correction of error before the parties incur significant litigation or settlement costs”). Respondents read non-existent limitations into the rule that would thwart that purpose.<sup>4</sup>

## **II. THIS COURT SHOULD EXERCISE ITS DISCRETION UNDER RULE 23(f) TO REVIEW THE CLASS CERTIFICATION ORDER AT ISSUE HERE**

“Permission to appeal may be granted or denied on the basis of any consideration that the courts of appeals finds persuasive.” *Newton*, 259 F.3d at 165. Multiple considerations warrant review at this juncture.

### **A. The District Court’s Certification Order Is Erroneous**

This Court has expressly recognized that review is proper when the district court’s “ruling on class certification is likely erroneous.” *Newton*, 259 F.3d at 164. An “error in the class certification decision that does not implicate novel or unsettled legal questions may still merit interlocutory review given the consequences likely to ensue.” *Id.* The certification order here was erroneous because it

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<sup>4</sup> Before Rule 23(f), courts could correct erroneous class certification decisions through mandamus. But mandamus set a high bar: “[T]he district court’s decision [had to] lie[] far outside the bounds of established . . . law.” *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1289 (3d Cir. 1994). Rule 23(f) “was explicitly promulgated to replace the use of mandamus in reviewing manifestly erroneous class certifications [so] it would be inappropriate to review such petitions under standards as stringent as those which govern mandamus.” *Lienhart*, 255 F.3d at 144.

failed to account for serious intra-class conflicts.<sup>5</sup>

“[A] diversity among subgroups” requires denial of class certification. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (denying certification where conflict existed between present and future claimants). Here, the settlement compensates cases of CTE in individuals who died before July 7, 2014 but gives nothing to individuals living with CTE or who die with CTE after July 7, 2014. Pet. 10. Respondents offer no explanation for that glaring, illogical discrepancy.

Respondents suggest that the settlement need not compensate CTE specifically because it compensates “actual” or “demonstrated” neurocognitive or neuromuscular “impairment” or “deficits.” Class Opp. 14 & 15 n.6; NFL Opp. 18. But that is inconsistent with compensating those who died with CTE before preliminary approval. And it is inconsistent with accepted medical and scientific literature, as well as the allegations Class Counsel and others have made throughout the litigation. CTE should still be compensated alongside ALS, Alzheimer’s Disease, Parkinson’s Disease, and dementia:

- CTE *is* a demonstrated neurocognitive impairment or deficit: It is “a ***progressive degenerative disease of the brain*** found in athletes . . . with a

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<sup>5</sup> Respondents label these intra-class conflicts as an attack on the settlement, not certification. Class Opp. 9-10; NFL Opp. 18-19. But this Court properly addresses intra-class conflicts resulting from settlement distribution terms as class certification questions. *See, e.g., Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 187-88 (3d Cir. 2012) (finding inadequate representation under Rule 23(a)(4)); *GM Trucks*, 55 F.3d at 800-04 (same).

history of repetitive brain trauma.” BU CTE Center, *What Is CTE?*, <http://www.bu.edu/cte/about/what-is-cte/> (emphasis added).

- The Class Action Complaint alleges that CTE is an ***independent, MTBI-related disease***: “[T]he NFL has known for decades that MTBI can and does lead to long-term brain injury, including, but not limited to memory loss, dementia, Alzheimer’s Disease, Parkinson’s Disease, ALS, depression, and CTE and its related symptoms.” Compl. ¶127.
- CTE presents with serious symptoms beyond neurocognitive or neuromuscular impairment, including headache, depression, impulsivity, explosivity, aggression, visuospatial difficulties, and language impairment. McKee *et al.*, *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 *Brain: A Journal of Neurology* 43, 54-56 (2013) (tbls. 3 & 4).
- The correlation between CTE and another qualifying diagnosis is weak. In one study of 68 individuals with CTE, eight presented with motor neuron disease (such as ALS), seven presented with Alzheimer’s Disease, and six presented with Parkinson’s Disease. McKee, *supra*, at 43, 50-51, 61. But over ***two-thirds*** presented ***only*** with CTE.

CTE is a disease that results in neurocognitive impairment. And it should be compensated under any settlement regardless of when a player dies with that illness.

Class Counsel (at 14) acknowledge that an “autopsy diagnosis of CTE serves as sufficient evidence of harm for purposes of establishing compensation” for class members who died before July 7, 2014. But there is no reason why such a diagnosis is insufficient for individuals who died after July 7. CTE diagnosed in the living merits compensation too. *See* Pet. 12 & n.5; Pet. Ex. C at 9-11.

In addition to the discriminatory treatment of class members with CTE, the class contains conflicts based on the arbitrary 75% reduction of payments to members suffering a stroke or a concussion unrelated to NFL play. *See* Pet. 14-15. It

also arbitrarily rejects credit for seasons played with NFL Europe. *See id.* at 15-16.

Respondents insist that the intra-class conflicts petitioners have identified are factual questions that require additional development before the district court. Class Opp. 11-12; NFL Opp. 16-18. But, again, this issue can be determined from reviewing the settlement on its face. *See GM Trucks*, 55 F.3d at 797.<sup>6</sup>

Significantly, respondents devote little effort to justifying these obvious conflicts. That is because they cannot be justified. These conflicts result in inappropriately awarding “considerably more value to one class of plaintiffs.” *GM Trucks*, 55 F.3d at 797. Accordingly, the class members at whose expense the handful who qualify are enriched lack adequate representation.

#### **B. Defects in the Settlement Process Require Immediate Review**

Numerous other deficiencies in the settlement – including inadequate notice and an overly burdensome claims process – justify granting immediate review. Respondents urge this Court to ignore those considerations. Class Opp. 9-10; NFL Opp. 18-20. But this Court may consider “any consideration that [it] finds persuasive.” *Newton*, 259 F.3d at 165. Those deficiencies render the settlement *process* unfair to the point of violating due process. The class notice has already been sent, but it fails to explain clearly the limitations on CTE compensation. Pet. 17. The claims process, moreover, erects hurdle after hurdle that threatens to deprive class

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<sup>6</sup> It is ironic that Class Counsel argue that factual development is necessary given that they conducted no discovery before settling.

members of the recovery promised to them. If a class member does not register within 180 days, he receives nothing. Pet. 18. And the appeals process is weighted in the NFL's favor. *Id.* These deficiencies will doom the settlement in a later appeal. *See Eubank v. Pella Corp.*, 753 F.3d 718, 724-25 (7th Cir. 2014) (rejecting settlement that "strews obstacles in the path of" valid claimants).

### **C. For Many Class Members, Time Is of the Essence**

For many class members, a settlement that is consummated years from now will come too late. Respondents do not suggest otherwise. Indeed, they ignore petitioners' argument of the urgency of many class members' situations.

The diseases resulting from MTBI are debilitating, degenerative, and expensive to treat. *See* Pet. 18-19. The condition of those who are sick will worsen if appellate review of this settlement class occurs only after final approval. Many who are healthy will become sick, going without the benefit of diagnostic examinations that a fair settlement would provide. Delaying diagnosis and treatment will have disproportionately large consequences because early intervention and treatment of these neurodegenerative conditions can increase quality of life, slow the progression of the disease, and decrease the overall cost of caring for those afflicted. *See, e.g., Prince et al., World Alzheimer Report 2011: The Benefits of Early Diagnosis and Intervention* 6, 23-31 (2011). And all class members would carry on their own the burdensome costs of medical treatment, lost wages,

and other losses resulting from the injuries they suffered at the hands of the NFL.

### **CONCLUSION**

Substantial defects were raised with the district court twice and it certified the class nonetheless – albeit in a commendable effort to resolve a complex litigation. Allowing the case to proceed to a fairness hearing will inevitably result in substantial delay, as the case will eventually return to this Court to address problems that can be fixed now.

This Court has jurisdiction over this matter. The language and history of the rule make that clear. Nothing in respondents’ arguments demonstrates otherwise. Indeed, this case presents a classic circumstance to effect the purpose of Rule 23(f) – avoiding unnecessary delay and expense, as well as a waste of judicial resources.

The injured members of the class are entitled to a prompt resolution. To that end, we suggest that briefing of this matter occur on a reasonably expedited basis. The key issues have been addressed already and certainly are familiar to the parties. Class Counsel and the NFL have moved with less than deliberate speed thus far – taking four months to file the initial settlement with the district court after announcing it, and then taking five months to file a revised settlement after their first effort was rejected.<sup>7</sup> We respectfully request that the petition be granted and a reasonably expedited briefing schedule be set.

---

<sup>7</sup> It is unclear how much of this time was spent negotiating Class Counsel’s nine-figure attorneys’ fee, plus the potential for 5% of the awards to class members.

August 14, 2014

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### **CERTIFICATE OF COMPLIANCE**

1. This reply complies with the page limitation of Federal Rules of Appellate Procedure 5(c) and 27(d)(2) because it does not exceed 10 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).
2. This reply complies with the typeface requirements of Federal Rule of Appellate Procedure 32(c)(2) and 32(a)(5) and the type style requirements of Rule 32(a)(6) because this reply has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

August 14, 2014

/s/ Steven F. Molo  
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**CERTIFICATE OF SERVICE**

I certify that today, August 14, 2014, the foregoing Reply in Support of Petition for Permission to Appeal was filed with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit using the CM/ECF system, which will send notice of filing to all parties.

August 14, 2014

/s/ Steven F. Molo  
Steven F. Molo

# Exhibit CC

Nos. 15-2272, 15-2294

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**In the United States Court of Appeals  
for the Third Circuit**

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**IN RE NATIONAL FOOTBALL LEAGUE PLAYERS  
CONCUSSION INJURY LITIGATION**

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania

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**CORRECTED OPENING BRIEF OF APPELLANTS RAYMOND ARMSTRONG,  
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## TABLE OF CONTENTS

Table of authorities .....	iii
Introduction .....	1
Jurisdictional statement.....	4
Statement of the issues .....	4
Statement of related cases and proceedings.....	5
Statement of the case .....	5
1. Chronic traumatic encephalopathy (CTE) is discovered in former professional football players. ....	6
2. The NFL goes to great lengths to hide the effects of concussions—both before and after the discovery of CTE.....	7
3. The evolving research on CTE confirms its prevalence in football players and its association with behavioral and mood disorders.....	10
4. Responding to CTE’s discovery, injured football players seek compensation and their lawsuits are consolidated. ....	12
5. Only one month after appointment of a mediator, the plaintiffs’ lawyers ink a tentative deal with the NFL and ultimately propose a global settlement. ....	15
6. The parties propose a revised settlement that would globally release both present and future claims. ....	16
7. Over many objections, the district court gives final approval to the settlement.....	21
Summary of argument.....	26
Standard of review .....	28
Argument .....	29
I. Because the settlement’s terms and the structure of the negotiations both make clear that future-injury plaintiffs were inadequately represented, approval of this settlement must be reversed. ....	29
A. The settlement’s disparate treatment of present and future claimants cannot be justified. ....	31
B. The settlement’s unjustified disparate treatment is the result of negotiations that lacked sufficient structural protections for future claimants. ....	40

II. The attorney-fee-deferral procedure, which insulates any fee request from meaningful scrutiny, is unlawful and provides an independent ground for reversal under this Court’s precedent. ....	46
III. Alternatives are available on remand.....	54
Conclusion .....	57
Combined certifications.....	59
Appendix: biographies of the appellants (Armstrong Objectors)	

## TABLE OF AUTHORITIES

### Cases

<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997) .....	<i>passim</i>
<i>Bowling v. Pfizer, Inc.</i> , 143 F.R.D. 141 (S.D. Ohio 1992).....	39, 56
<i>Contrast Silverman v. Motorola, Inc.</i> , 739 F.3d 956 (7th Cir. 2013).....	51
<i>Dewey v. Volkswagen Aktiengesellschaft</i> , 681 F.3d 170 (3d Cir. 2012).....	44, 45, 46, 55
<i>Drimmer v. WD-40 Co.</i> , No. 06-cv-900, 2007 WL 2456003 (S.D. Cal. 2007) .....	44
<i>General Motors Corp. v. Bloyed</i> , 916 S.W.2d 949 (Tex. 1996).....	49
<i>Georgine v. Amchem Products, Inc.</i> , 83 F.3d 610 (3d Cir. 1996).....	<i>passim</i>
<i>Glasser v. Volkswagen of America, Inc.</i> , 645 F.3d 1084 (9th Cir. 2011).....	51
<i>In re Asbestos Litigation</i> , 90 F.3d 963 (5th Cir. 1996).....	56
<i>In re Blood Reagents Antitrust Litigation</i> , 783 F.3d 183 (3d Cir. 2015).....	28
<i>In re Bluetooth Headset Products Liability Litigation</i> , 654 F.3d 935 (9th Cir. 2011).....	51
<i>In re Community Bank of Northern Virginia</i> , 418 F.3d 277 (3d Cir. 2005).....	28
<i>In re Constar International Inc. Securities Litigation</i> , 585 F.3d 774 (3d Cir. 2009).....	28

<i>In re GM Corp. Engine Interchange Litigation</i> , 594 F.2d 1106 (7th Cir. 1979).....	38, 49, 51
<i>In re GM Pick-Up Truck Fuel Tank Products Liability Litigation</i> , 55 F.3d 768 (3d Cir. 1995).....	<i>passim</i>
<i>In re Joint Eastern &amp; Southern District Asbestos Litigation</i> , 982 F.2d 721 (2d Cir. 1992).....	42
<i>In re Literary Works in Electronic Databases Copyright Litigation</i> , 654 F.3d 242 (2d Cir. 2011).....	44
<i>In re MBTE Products Liability Litigation</i> , 209 F.R.D. 323 (S.D.N.Y. 2002) .....	44
<i>In re Mercury Interactive Corp. Securities Litigation</i> , 618 F.3d 988 (9th Cir. 2010).....	27, 48, 49
<i>In re Oil Spill by Oil Rig Deepwater Horizon</i> , 295 F.R.D. 112 (E.D. La. 2013).....	56, 57
<i>In re Southwest Airlines Voucher Litigation</i> , — F.3d —, 2015 WL 4939676 (7th Cir. Aug. 20, 2015).....	50
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982) .....	37
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973) .....	39
<i>McNair v. Synapse Group</i> , 672 F.3d 213 (3d Cir. 2012).....	28
<i>National Super Spuds v. New York Mercantile Exchange</i> , 660 F.2d 9 (2d Cir. 1981).....	31, 37, 38, 55
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999) .....	29, 53, 54, 55
<i>Piambino v. Bailey</i> , 610 F.2d 1306 (5th Cir. 1980).....	47



<i>Prandini v. National Tea Co.</i> , 557 F.2d 1015 (3d Cir. 1977).....	48
<i>Redman v. RadioShack Corp.</i> , 768 F.3d 622 (7th Cir. 2014).....	<i>passim</i>
<i>TBK Partners, Ltd. v. Western Union Corp.</i> , 675 F.2d 456 (2d Cir. 1982).....	37
<i>Thompson v. American Tobacco Co.</i> , 189 F.R.D. 544 (D. Minn. 1999) .....	44
<i>Walker v. Liggett Group, Inc.</i> , 175 F.R.D. 226 (S.D. W. Va. 1997).....	43
<i>Weinberger v. Great Northern Nekoosa Corp.</i> , 925 F.2d 518 (1st Cir. 1991) .....	50

## Statutes

28 U.S.C. § 1291 .....	4
28 U.S.C. § 1332(d)(11).....	4

## Rules

Federal Rule of Civil Procedure 23(a)(4).....	4
Federal Rule of Civil Procedure 23(b)(3) .....	23
Federal Rule of Civil Procedure 23(e)(2).....	4
Federal Rule of Civil Procedure 23(h) .....	4, 25, 48
Federal Rule of Civil Procedure 23(h), 2003 advisory committee’s note .....	54
Federal Rule of Civil Procedure 23(h)(1), 2003 advisory committee’s note.....	49
Federal Rule of Civil Procedure 54(d)(2)(B)(iv) .....	54

## Articles

Paul D. Anderson, <i>Stabler’s Death is a Stark Reminder About the Settlement’s Deficiencies</i> , NFL Concussion Litigation, July 10, 2015.....	18
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John C. Coffee, Jr., <i>Class Action Accountability</i> , 100 Colum. L. Rev. 370 (2000) .....	56
John C. Coffee, Jr., <i>Class Wars</i> , 95 Colum. L. Rev. 1343 (1995) .....	56
Steve Fainaru & Mark Fainaru-Wada, <i>UCLA study finds signs of CTE in living former NFL players</i> , ESPN, Jan. 22, 2013 .....	12
Mark Fainaru-Wada & Steve Fainaru, <i>League of Denial</i> (2013) .....	<i>passim</i>
<i>Forrest Gregg fighting Parkinson's</i> , Associated Press, Nov. 16, 2011 .....	17
David Geier, <i>Will football players one day take medicine to prevent brain damage?</i> , The Post and Courier, Aug. 5, 2015 .....	11, 34
Geoffrey Hazard, <i>The Futures Problem</i> , 148 U. Pa. L. Rev. 1901 (2000) .....	29
William D. Henderson, <i>Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements</i> , 77 Tulane L. Rev. 813 (2003) .....	50
Samuel Issacharoff & Richard A. Nagareda, <i>Class Settlements Under Attack</i> , 156 U. Pa. L. Rev. 1649 (2008) .....	45
<i>Manual for Complex Litigation</i> (4th ed. 2007) .....	54
Richard A. Nagareda, <i>Autonomy, Peace, and Put Options in the Mass Tort Class Action</i> , 115 Harv. L. Rev. 747 (2002) .....	56
Joe Nocera, <i>NFL's Bogus Settlement for Brain-Damaged Former Players</i> , N.Y. Times, Aug. 11, 2015 .....	11
Alan Schwarz, <i>A Suicide, a Last Request, a Family's Questions</i> , N.Y. Times, Feb. 22, 2011 .....	12
Charles Silver, <i>Due Process and the Lodestar Method</i> , 74 Tulane L. Rev. 1809 (2000) .....	51
Brian Wolfman & Alan B. Morrison, <i>Representing the Unrepresented in Class Actions Seeking Monetary Relief</i> , 71 N.Y.U. L. Rev. 439 (1996) .....	42, 55

## INTRODUCTION

By the summer of 2013, the NFL’s executives faced a crisis. Despite the League’s campaign to obscure the effects of concussions in pro football, the autopsy of a beloved former player had led to the discovery several years earlier of chronic traumatic encephalopathy. Characterized by mood and behavioral problems, and even suicide, CTE is a neurodegenerative condition caused only by repeated head trauma. Of 91 former NFL players’ brains examined, CTE has been found in 87.

The discovery of CTE set off a wave of lawsuits by over 5,000 players—a legal and public-relations nightmare for the NFL. But those in the NFL’s boardroom that summer were even more alarmed by what they saw on the horizon, and what the rapidly evolving science foretold: a tsunami of claims by the far larger number of players who would be diagnosed with CTE in the decades to come.

So the NFL wanted an end game: It would pay those with present injuries, including families of players who had already died with CTE. In exchange, the NFL would secure a sweeping global release of *all* former players’ future CTE claims, without paying any of them.

This bargain would result in a stark disparity: The family of a player who dies with CTE *before* the class-action settlement’s approval gets up to \$4 million. But an identically situated player who dies a day *after* the settlement’s approval releases his claim and gets paid nothing—for the exact same diagnosis.

Why did the NFL believe it could get the plaintiffs' lawyers to go along with such a lopsided deal? Because, for these lawyers and their injured clients, "the critical goal is generous immediate payments." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997). "That goal," however, "tugs against the interest" of those with future claims, *id.*, who would prefer to reduce payouts now in favor of "sturdy back-end opt-out rights" and a deal that "keep[s] pace with changing science." *Id.* at 610-11.

Why did the NFL and the lawyers think they could disregard the thousands of former players who may be diagnosed with CTE in the future? Because none of the lawyers at the negotiating table independently represented their interests. The personal-injury cases had been consolidated before a single judge in Philadelphia, who appointed a Plaintiffs' Steering Committee and ordered it to mediate with the NFL in July 2013. But the court never appointed independent counsel for the future claimants, whose rights the Committee had every incentive to trade away.

Just a few weeks later, in August 2013, the NFL and the lawyers emerged with a signed term sheet. There had been no formal discovery, and no litigation beyond a motion to dismiss. Yet the plaintiffs' lawyers secured the right to seek a nine-figure fee award. The NFL got the sweeping release it wanted, and the present claimants got their compensation. Meanwhile, thousands of potential future CTE claimants—including the 34 Armstrong Objectors—were left on the sidelines.

Neither “the terms of the settlement” nor “the structure of the negotiations” can provide this Court with any assurance that the interests of future claimants were truly represented during the negotiation process. *Id.* at 627. As to the terms: The settling parties are unable to defend the disparate treatment at the heart of this deal. They cannot explain why a player who dies with CTE tomorrow loses the millions that would go to that same player if he died last year.

As to the structure: The supposedly independent “futures” subclass counsel was not, in fact, independent. He was picked by, and from within, the Plaintiffs’ Steering Committee. And the subclass representative was recruited only *after* the deal had already been hashed out by the lawyers. He doesn’t even allege a claim based on CTE—either for himself or for the thousands of players he supposedly represents. A “representative” who abandons the most valuable claims of those he represents, for nothing, is no representative at all—certainly not an adequate one.

This inadequacy is underscored by class counsel’s refusal to file a fee request until after final approval, leaving many critical questions unanswered. That procedure violates the rule in this circuit that “a thorough judicial review of fee applications is required in all class action settlements.” *In re GM Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995). “There was no excuse for permitting so irregular, indeed unlawful, a procedure,” *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014)—an independent ground for reversal.

## **JURISDICTIONAL STATEMENT**

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332(d)(2). It entered a final judgment giving final approval to a class-action settlement on April 22, 2015. All but one of the appellants (known as the Armstrong Objectors) timely filed their notice of appeal on May 20, 2015. The remaining appellant timely filed his notice of appeal on May 21, 2015. This Court has jurisdiction under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

**I.** A class-action settlement may be approved only if it is “fair, reasonable, and adequate,” Fed. R. Civ. P. 23(e)(2), and only if “the representative parties [have] fairly and adequately protect[ed] the interests of the class,” Fed. R. Civ. P. 23(a)(4). Did the district court err in approving the settlement here without the requisite assurance—“either in the terms of the settlement or in the structure of the negotiations,” *Amchem*, 521 U.S. at 627—that former NFL players at risk of CTE were adequately represented by a single player who didn’t allege this risk himself but instead abandoned that claim?

**II.** Where attorneys’ fees are sought in connection with a class-action settlement, the class must be given notice and an opportunity to object. Fed. R. Civ. P. 23(h). Did the district court err in excusing class counsel’s failure to file a fee

motion before final approval, even though this failure deprived class members of important information and effectively insulated counsel's fees from scrutiny?<sup>1</sup>

### **STATEMENT OF RELATED CASES AND PROCEEDINGS**

The Court previously dismissed an interlocutory appeal for lack of jurisdiction. *See In re NFL Players Concussion Injury Litig.*, 775 F.3d 570 (3d Cir. 2014).

These two appeals (15-2272, 15-2294) have been consolidated with ten others.

### **STATEMENT OF THE CASE**

This brief is filed by the Armstrong Objectors, 34 settlement-class members who played an average of more than six NFL seasons. They include Pro Bowl selectees, All-Pros, Super Bowl champions, a Super Bowl MVP, and a Pro Football Hall of Fame inductee. The oldest began his career in 1960; the youngest retired after 2011. Their biographies are provided in an appendix to this brief.

None of the Armstrong Objectors has a qualifying diagnosis under the proposed settlement. They are united in their concern that, if they are diagnosed with CTE in the future, their claims against the NFL would be extinguished without compensation under the proposed settlement.

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<sup>1</sup> These issues were definitively ruled upon in the district court's approval order. A.135-147 (fairness of the settlement terms and treatment of death with CTE); A.91-93, 96, 99-103 (fairness and adequacy of future-claimant representative); A.88 (failure to file fee motion). The same issues were also raised in objections filed in the district court: Dkt. No. 6248 at 2; Dkt. No. 6242 at 3-4; Dkt. No. 6241 at 14-28; Dkt. No. 6201 at 33-38; Dkt. No. 6213 at 2-4, 9; Dkt. No. 6230 at 19-20; and Dkt. No. 6201 at 94.

**1. Chronic traumatic encephalopathy (CTE) is discovered in former professional football players.** In September 2002, football legend Mike Webster died of a heart attack. A.5303. A former center for the Pittsburgh Steelers, Webster's career spanned seventeen NFL seasons and four Super Bowl championships, culminating in his induction into the Hall of Fame. Mark Fainaru-Wada & Steve Fainaru, *League of Denial* 20, 23, 47, 57 (2013). Since retiring, however, Webster's health had taken a nosedive. His death followed a decade of decline, marked by depression, impulsive behavior, cognitive slowdown, and severe memory loss. *Id.* at 47-57; A.2619. By age fifty, he was unemployed, intermittently homeless, and frequently unable to recognize friends and family. A.2619. Though it was Webster's heart that failed him, researchers discovered that the deeper damage lay in his brain.

By examining Webster's brain through specialized staining techniques, scientists uncovered an abnormal series of dark patches made up of "tau," a protein that usually transports nutrients to cells. A.3210. In Webster's case, however, the tau had congealed into clumps and strangled his neurons, leading his brain to atrophy. A.2619, 2801, 5260. Doctors were stumped: brains rarely deteriorate so young. A.2619. The only precedent was "dementia pugilistica," first diagnosed in professional boxers who had suffered repeated head trauma and subsequently experienced prolonged confusion and dulled mental capacity,



inspiring the term “punch drunk.” A.2281, 3210. As an offensive lineman, Webster had sustained repeated blows to the head on numerous occasions, causing damage that prompted one doctor to ask if he’d been in a car accident. “Have you been hit lately? And how often?” the doctor asked. Webster responded, “Oh, probably about 25,000 times or so.” *League of Denial* 57.

Only after his death did it become clear that playing football had not just injured Webster’s body but caused his brain to degenerate—through a disease that scientists named chronic traumatic encephalopathy, or CTE. A.2287, 2920. For years, players and their families had seen team members develop mood and behavioral problems and wondered whether they related to football. Webster’s autopsy confirmed the connection.

**2. The NFL goes to great lengths to hide the effects of concussions—both before and after CTE’s discovery.** This connection should have come as no surprise to the NFL. Studies have linked head trauma and brain damage since the 1920s. A.2287, 2620. And beginning in the early 1990s, football observers and medical professionals issued warnings that concussions can cause long-term harm and urged NFL officials to treat them as a serious injury.

But the NFL failed to heed this advice. Players reported that “intimidation” to keep playing after a head injury was “common in the NFL.” *League of Denial* 214. And although many players “suffered more than one hundred mild traumatic brain

injuries” during their careers, then-NFL Commissioner Paul Tagliabue stated that the number of concussions “is relatively small.” A.2237; *League of Denial* 127.

Not only did the NFL disregard evidence showing that concussions and sub-concussions can result in severe behavioral problems and long-term dementia; the League actively sought to refute it. In 1994, the NFL created the Mild Traumatic Brain Injury (MTBI) Committee, ostensibly designed to study the medical effects of brain injuries and institute necessary safety measures. A.2632. Commissioner Tagliabue appointed Elliot Pellman, a rheumatologist, to lead the Committee, even though—as a specialist in bone and joint disorders—Pellman “had not produced a single piece of literature on the subject of concussions.” A.5258; *League of Denial* 127. Nearly half the Committee consisted of current NFL team doctors. A.5258.

In 2001, the MTBI Committee began publishing its research. One paper stated that concussions occurred at very low rates, and that it was fine for players who did suffer them to return to the field within a week, never missing a game. A.2660-62, 2799. Another denied that repeat concussions created any risks, citing the fact that medical staff allowed players suffering from head trauma to return to the field shortly after they sustained their injuries. A.2661, 5259. This conclusion “flew in the face not only of previous research but of widely known realities on an NFL sideline,” where both players and staff underreported concussions and glorified a gladiator culture that promoted toughness over safety. A.2284; *League of*

*Denial* 145. Peer reviewers called the NFL’s research “potentially dangerous,” describing it as “at odds with virtually all published guidelines and consensus statements,” which found that sustaining one concussion left a player predisposed to another. *Id.* at 146-47.

Still, the NFL’s research team refused to acknowledge any link. In 2007, HBO’s “Real Sports” interviewed Dr. Ira Casson, co-chairman of the MTBI Committee. A.2664. Their exchange captured the extent of the NFL’s denial:

Q. Is there any evidence, as far as you are concerned, that links multiple head injuries among pro football players with depression?

A. No. ....

Q. Is there any evidence as of today that links multiple head injuries with any long-term problem[s]?

A. In NFL players?

Q. Yeah.

A. No.

A.2644.

By 2007, however, scientists had in fact documented three cases of CTE among football players—clear evidence of brain damage caused by football. The *New York Times* and *Boston Globe* began to publish stories documenting the severe mental decline of retired NFL players. A.2619. As the outpouring of evidence and voices grew louder, the League scrambled to respond. A.5273. That summer it hosted a Concussion Summit, a conversation about the prevalence and effects of concussions in football, inviting scientists whose work it had previously sought to

discredit. A.5263. Despite these overtures, the NFL's official position remained that there was no connection between playing football and brain damage.

More than two years passed before the NFL reversed course, officially acknowledging that "concussions can lead to long-term problems." A.2250. By 2010, the old leadership of the MTBI Committee was out. The new guard—two prominent NFL-appointed neurosurgeons—conceded that the Committee's earlier research was "infected" and had misled players. A.2246, 5274.

**3. *The evolving research on CTE confirms its prevalence in football players and its association with behavioral and mood disorders.*** When researchers started examining what would become known as CTE, they first thought it was a variation of Alzheimer's disease. In Alzheimer's, tau protein forms tangles that strangle neurons from the inside, leading to severe memory loss. In CTE, however, the tangles do not appear in the hippocampus—the site of our memory—but in the cortex, the site of cognition. A.2291.

CTE manifests itself primarily through emotional and cognitive symptoms. A.2287. Early signs include severe headaches and loss of attention and concentration. A.2255. Affected players go on to struggle with depression, anger, and short-term memory loss, followed by motor impairment, aggression, language difficulty, and dementia. A.2237, 2255. In the process, many players develop substance-abuse problems, lose basic functioning abilities, and contemplate suicide.

A.2287, 5275. As co-lead class counsel explained, “CTE is believed to be the most serious and harmful disease that results from [the] NFL and concussions.” A.2237.

Although research into CTE has advanced significantly over the last decade, at present CTE can be diagnosed definitively only after death, making it difficult to identify its full extent and prevalence among living players. A.2957. The studies that have been conducted, however, suggest that the severity of a CTE diagnosis correlates with the number of NFL seasons played, and that the disease may be widespread. A.2255. Researchers at Boston University’s CTE Center—the country’s largest brain bank focused on traumatic brain injury—inspected the brains of 91 deceased football players and found at least traces of CTE in 87 of them. A.2370.<sup>2</sup> These results caused Ann McKee, a leading neuropathologist at the CTE Center, to wonder “if every single football player doesn’t have this.” A.5248.

She may soon find out. Scientists predict that methods to reliably diagnose CTE in living patients may emerge within “the next decade, if not sooner.” A.4420, 4597, 4620, 4768, 4953, 5004; *see* Joe Nocera, *NFL’s Bogus Settlement for Brain-Damaged Former Players*, N.Y. Times, Aug. 11, 2015, <http://nyti.ms/1PvayQ0>.

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<sup>2</sup> The data cited in the record (reflecting a CTE diagnoses in 76 of 79 brains) have since been updated; the ratio has remained roughly the same as the numbers have increased. *See* David Geier, *Will football players one day take medicine to prevent brain damage?*, The Post and Courier, Aug. 5, 2015, <http://tinyurl.com/oa39muf>.

Already, researchers have made great strides. A.3212-13. UCLA scientists, for example, used brain-imaging tools in 2013 to detect tau protein in five former players—the first time that researchers were able to show signs of CTE in living patients. Steve Fainaru & Mark Fainaru-Wada, *UCLA study finds signs of CTE in living former NFL players*, ESPN, Jan. 22, 2013, <http://espn.com/1PkszAu>. Researchers are also testing other techniques to detect CTE during life. A.3213. As research continues, these technologies will become “more sensitive, more accurate,” and “CTE diagnoses in living people will become more reliable.” A.3031.

This effort has been aided by more than a dozen players who have donated their brains to Boston University. A.3181. Before killing himself in 2011, Dave Duerson, a former star for the Chicago Bears, left a note requesting that his family donate his brain to the CTE Center. “Please, see that my brain is given to the NFL’s brain bank.” Alan Schwarz, *A Suicide, a Last Request, a Family’s Questions*, N.Y. Times, Feb. 22, 2011, <http://nyti.ms/1L5BA1O>.

**4. Responding to CTE’s discovery, injured football players seek compensation and their lawsuits are consolidated.** Within the past five years, amid mounting evidence that football causes CTE and growing awareness of the NFL’s cover-up, many football players have sought redress. At first, hundreds of former players filed claims in California, where workers’ compensation laws enabled players who played at least one game in the state to obtain compensation

for on-the-job injuries. *League of Denial* 306. But because the sums awarded were usually insufficient to cover a lifetime of brain damage, players soon turned to the courts. In 2011, 73 former players sued the NFL, alleging that it had failed to take reasonable actions to protect players from the “chronic risks” created by concussions, and had “fraudulently concealed” those risks from players. A.793, 726.

Later that year, a separate group of players sued in Philadelphia district court. The lead plaintiff was Ray Easterling, a former Atlanta Falcons player. Like others who later joined the case, Easterling had spent his career playing in the NFL and, after retirement, had begun exhibiting sharp mood swings, inattentiveness, and erratic behavior. Eight months after filing the suit, Easterling killed himself. Researchers found his brain riddled with CTE. A.5107-08, 5183, 5303.

In January 2012, the lawsuits were consolidated before Judge Anita Brody in Philadelphia. A.62. Following consolidation, an additional 4,500 players filed more than 300 similar suits against the NFL, and all were transferred to Judge Brody. *Id.* Plaintiffs’ lawyers proposed the creation of a Plaintiffs’ Steering Committee to direct the litigation. The court approved the Committee’s structure without appointing anyone to represent the interests of future claimants. A.62.

The plaintiffs filed their collective complaint in July 2012. It alleged fourteen claims, spanning various counts of negligence and fraud. But the core allegation remained the same: that the NFL’s conduct had “obfuscated the connection

between NFL football and long-term brain injury.” A.63. The central issue was still CTE. A.867-72, 2511 (“This started out as a CTE case. It is still a CTE case.”).

As the litigation spilled into the following year, the district court ordered the parties to mediate, expressing “the hope that a negotiated, mutually beneficial settlement could be reached.” A.65. In July 2013, the court appointed retired Judge Layne Phillips as mediator.

After mediation was underway and the contours of an initial deal had begun to take shape, the Steering Committee recognized the conflicting interests within the class and took it upon itself to create putative “subclasses.” One “subclass” would consist of retired players who already had been diagnosed with particular neurocognitive impairments (including those who died with CTE) and therefore had present claims against the NFL. The second would consist of retired players who suffered from none of the specified impairments but were—by virtue of having played in the NFL—at risk for CTE, though they had no way of presently knowing whether the disease had begun to develop or would develop in the future.

The Committee designated Kevin Turner, a former player who suffered from ALS, as representative of the present-claims subclass. To represent the future-claims players—the majority of the putative class—the Steering Committee recruited Corey Swinson, a former running back who had played just one NFL season and had not yet been diagnosed with any brain injuries or behavioral or



mood disorders. A.3570. Because Swinson had not suffered any current injury from his sole season in the League, he was not one of the 5,000 players who had sued the NFL and thus had no lawyer. So the plaintiffs' lawyers selected an existing member of the Steering Committee to serve as his "independent" counsel. A.3570.

**5. Only one month after appointment of a mediator, the plaintiffs' lawyers ink a tentative deal with the NFL and ultimately propose a global settlement.** By the end of August 2013—just one month after the mediator's appointment and before even taking any formal discovery against the NFL—plaintiffs' counsel had signed a term sheet outlining a settlement with the NFL. A.67. One month later, before the parties had inked an actual settlement, Swinson died. According to plaintiffs' counsel, Swinson had provided his assent to drafts of the term sheet before his death. A.3570.

For more than a month after Swinson's death—during a critical period when the contours of the deal outlined in the term sheet were being fleshed out—there was no plaintiff even purporting to represent the future-claims players. Then, in mid-October, plaintiffs' counsel found Shawn Wooden and recruited him to take Swinson's place, explaining to him the terms of the already-negotiated deal. A.3824, 3902. Wooden agreed not only to serve as a representative but to "support[] the settlement." A.3824, 3902. He had sustained repeated traumatic head impacts as a player and experienced neurological symptoms in the years since.

In 2012, he had described himself as “at increased risk of latent brain injuries” generally. A.786. But by the time he was “appointed” the proposed representative of future claimants, Wooden’s claim specified that he was at risk for “dementia, Alzheimer’s, Parkinson’s, or ALS”—but, critically, not CTE. A.1126, 3823.

In January 2014, plaintiffs’ counsel asked the district court to certify the class and approve the proposed settlement, which included a capped fund. A.67. Concerned that the fund would dry up prematurely, the court rejected the proposal. *Id.* Five months later, in June, the parties submitted a revised settlement that “retained the same basic structure as the original” but addressed some of the court’s concerns (including the cap, which was removed). A.68. In a declaration documenting the negotiations, the mediator stated that plaintiffs’ counsel had “passionately advocated” that players be compensated for “dementia, Alzheimer’s Disease, Parkinson’s Disease, and ALS.” A.3807. He did not say the same about CTE. Less than two weeks later, the court preliminarily approved the settlement and conditionally certified the class and two subclasses. A.69, 3824. Thereafter, nearly 200 former NFL players and their family members opted out. A.120.

**6. *The parties propose a revised settlement that would globally release both present and future claims.*** The proposed settlement would release the claims of two subclasses: (1) all retired NFL players diagnosed with a “qualifying diagnosis” before the final settlement date of April 22, 2015, and their

spouses and estates, and (2) all retired players not diagnosed with a qualifying diagnosis before the final settlement date and their spouses and estates. A.5714-15.

The six qualifying diagnoses are:

- ALS
- Death with CTE (but only if death occurs before April 22, 2015)
- Parkinson's Disease
- Alzheimer's Disease
- Level 2 (moderate) dementia
- Level 1.5 (early) dementia

A.5730.

**a. Compensation Framework.** The settlement awards compensation on a sliding scale, ranging from a maximum of \$5 million (for ALS) to a maximum of \$1.5 million (for early dementia). A.5740. How much a player receives depends on several factors, including his age at the time of his diagnosis, the number of seasons he played, and whether he was previously diagnosed with a stroke or traumatic brain injury. A.5629. For example, named plaintiff Kevin Turner, who has ALS, will be eligible for compensation. The same is true for players like Forrest Gregg, who has Parkinson's and can claim up to \$3.5 million. Dkt. No. 5130; *Forrest Gregg fighting Parkinson's*, Associated Press, Nov. 16, 2011, <http://es.pn/1hjK88I>.

Players with CTE, however, are entitled to compensation only if they died before the final approval date of April 22, 2015. A.80. So, for example, the family of Dave Duerson—who had CTE and died before April 22, 2015—is eligible for

up to \$4 million, the maximum amount paid for a death-with-CTE diagnosis. But the family of Ken Stabler, who died after April 22, 2015 and bore classic signs of CTE, will receive no compensation at all.<sup>3</sup> A.5329. By also foreclosing CTE-based compensation for players who suffer from the disease but have not yet died, and all players who do not yet suffer from it but one day will, the settlement treats future CTE claimants much differently than, say, future ALS claimants.

The only exception to this rule is if the player with CTE also exhibits conditions that trigger one of the other qualifying diagnoses and is able to claim compensation on that basis. But research suggests that these overlaps are only a minority of CTE cases. One study found that CTE was the sole diagnosis in 63% of cases, while Alzheimer's, for example, appeared in about one in ten. A.2255, A.3218. In another study of 33 CTE-infected brains, only 10 also showed signs of dementia. A.2955. Even among those with advanced CTE, a quarter were not considered cognitively impaired. A.2509-10.

As a result, the earliest and most prevalent symptoms of CTE—depression, aggression, chronic headaches, mood swings, and loss of concentration—trigger no compensation at all under the settlement. A.2509, 2955, 2958. The “key symptoms”

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<sup>3</sup> Stabler's family donated his brain to Boston University's CTE Center to “determine definitely whether Stabler suffered from CTE” and help advance the science around degenerative brain disease in athletes. “If it is determined that Stabler had CTE, his family will receive nothing under the settlement.” Paul D. Anderson, *Stabler's Death is a Stark Reminder About the Settlement's Deficiencies*, NFL Concussion Litigation, July 10, 2015, <http://bit.ly/1foSBFK>.

of CTE, in other words, “are not compensable.” A.2958. Conversely, the diseases that are compensated—namely, ALS, Parkinson’s, and Alzheimer’s—are those for which the incidence among retired NFL players is significantly lower than the incidence of CTE. A.2380. One study, examining NFL retirees who played at least five seasons, recorded just seven cases of ALS, seven of Alzheimer’s, and three of Parkinson’s—out of 3,439 retired players. A.2379-82, 2400. Even class counsel’s own estimates suggest that, of the 21,070-member class, only 31 players will exhibit ALS, 24 Parkinson’s, and 2,947 Alzheimer’s—14% of the class combined. A.1585. By contrast, expert research suggests that CTE’s incidence among NFL players may be as high as 96%, dwarfing the conditions that receive compensation. A.2370.

Based on the parties’ own estimates, approximately 15,000 class members (or 72% of the class) will never be compensated. A.1585. Although these players have no way of presently knowing whether they will be diagnosed with CTE, the settlement surrenders their right to assert any future claims based on a future CTE diagnosis, thus ensuring that those who do not also happen to suffer from a triggering neurodegenerative disease will receive no compensation. If, as in the case of Lew Carpenter, the condition leads to its telltale pattern of mood disturbances and memory loss *without* any signs of a qualified diagnosis, a player will have no recourse—even if the disease drives him to suicide. A.2508.

In addition, the settlement provides “free baseline assessment examinations of [class members’] objective neurological functioning.” A.70.

**b. *Reevaluation Subject Only to the NFL’s “Good Faith.”*** The settlement acknowledges that scientific advances may require adjustments to the compensation framework, but provides no mechanism or rules by which to make adjustments other than leaving it to the parties to “confer in good faith” about potential revisions to the qualifying diagnoses—including, in theory, how to treat CTE. A.136. Although the settlement “requires” the parties “to meet at least every ten years” to consider amending qualifying diagnoses, the NFL holds a complete right to veto any potential modifications. A.147.

**c. *Attorneys’ Fees.*** The settlement also includes what courts call a “clear-sailing clause,” under which class counsel may seek up to \$112.5 million in fees without the NFL contesting the request. A.88-89, 1082.

On top of this uncontested fee of up to \$112.5 million, which—unlike the players’ compensation—will be paid immediately, class counsel can also claim a set-aside worth 5% of the benefits paid to each class member (which the NFL also agrees not to contest), as well as contingency fees arising out of payments to class members whom class counsel represent on an individual basis. A.5671.

Based on their own damages estimates, the 5%-set-aside provision means that class counsel could secure potentially \$46.7 million in addition to the \$112.5

million already guaranteed. A.1599. Because class counsel has not released public information about its separate contingency-fee arrangements, it is impossible to estimate the additional compensation through such arrangements. Record evidence suggests, however, that the contingency agreements here mirror those in typical personal-injury cases, where counsel takes around 33%. *See* Letter from Mrs. Daniel Brabham, Nov. 5, 2014, Dkt. No. 6356 (“My attorney . . . is also entitled to 1/3 of what may be awarded to me and my three children.”).

Although class counsel must ordinarily seek fees contemporaneously with the approval process so that courts and class members may evaluate the overall contours of the deal and counsel’s efforts, the district court allowed counsel to seek fees separately, following final approval. A.88, A.5671. It is known that class counsel took no depositions and conducted no formal discovery, and engaged in only minimal motions practice followed by month-long negotiations. A.5405, 5433. Applying a \$600 average hourly rate for every partner, associate, and paralegal who worked on the case, \$112.5 million in fees would equate to 187,500 hours of time—the equivalent of 21.4 years (even without accounting for the additional fees through the 5% set-aside and contingency fees).

**7. Over many objections, the district court gives final approval to the settlement.** Class members began filing objections to the settlement shortly after preliminary approval and, last November, the court held a fairness hearing.

The Armstrong Objectors, appellants here, took aim at the central problem: “CTE is the disease that made football brain damage a national issue and a public health concern,” they explained. “Without it, neither this litigation, nor the [settlement itself] would likely exist. Yet the [settlement] forecloses every NFL retiree who has yet to die and be diagnosed with CTE from receiving a ‘Death by CTE’ award as if there will never be another case.” Dkt. No. 6233, at 18.

In April 2015—six months after the opt-out deadline had expired, and without class counsel having submitted a fee petition—the district court certified the class and two subclasses and approved the settlement. A.58-189.

**a. Class Certification and Adequacy.** The court began its analysis with class certification. It acknowledged that Rule 23’s certification requirements, including the requirement that absent class members be adequately represented, “demand[] undiluted, even heightened, attention in the settlement context.” A.80 (quoting *Amchem*, 521 U.S. at 620). It also recognized that the adequacy-of-representation requirement guards against conflicts of interest by “assur[ing] that differently situated plaintiffs negotiate for their own unique interests”—a concern that is particularly acute in settlement classes seeking to bind both “those with present injuries and those who have not yet manifested injury.” A.92 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 631 (3d Cir. 1996)).



Nevertheless, the court determined that the adequacy requirement was satisfied. A.99. The court reasoned that any conflict between class members with present injuries and those with possible future injuries was eliminated because class counsel, after “[r]ecognizing this problem” during settlement negotiations, “subdivided the Class into two Subclasses,” added a representative for the newly created future-injury subclass, and then designated a lawyer on the Plaintiffs’ Steering Committee to serve as his “independent counsel.” A.92-93.

The court found Mr. Wooden to be an adequate representative of the future-injury subclass because he “does not know which, if any, condition he will develop” in the future, and thus “has an interest in ensuring that the Settlement compensates as many conditions as possible.” A.93. The court did not attempt to square that statement with the fact that Wooden did not pursue compensation for CTE or specifically allege that he is at risk of developing the disease.

After addressing adequacy, the district court concluded that the other class-certification requirements were met, including Rule 23(a)(3)’s requirement that Mr. Wooden’s claim be typical of the subclass’s claims, and Rule 23(b)(3)’s requirement that common questions predominate over individual issues. A.83-85, 99-103.

***b. Settlement Fairness and Due Process.*** Having certified the subclasses, the court then turned to the settlement agreement. The court determined that it satisfied due process and is fair, reasonable, and adequate even

though it does not compensate any living class members for CTE and forces them to relinquish their right to bring any future “claims relating to CTE” against the NFL. A.77. The court explained that the parties had resolved the court’s “primar[y] concern[]”—the possibility that “the capped fund would exhaust before the 65-year life of the Settlement,” thereby creating the risk that some class members would receive nothing for their claims simply because their injuries were discovered too late. A.67. The court was unconcerned, however, that this same problem exists for CTE, given the disparity in the settlement’s treatment of present and future CTE claims.

The court attempted to justify this disparity in two ways. *First*, it speculated that providing a “prospective Death with CTE benefit would incentivize suicide because CTE can only be diagnosed after death.” A.144. *Second*, it believed that a living class member “does not need a death benefit because he can still go to a physician and receive a Qualifying Diagnosis” while living. *Id.* The court pointed to studies showing that many players who died with CTE “would have received compensation under the Settlement if they were still alive” because the disease, in its advanced stages, likely “inflicts symptoms compensated by Levels 1.5 and 2 Neurocognitive Impairment and is strongly associated with the other Qualifying Diagnoses in the Settlement.” A.136, 142. Based on that possible partial overlap,

the court determined that these diagnoses are adequate “prox[ies]” for CTE, so CTE need not be compensated for any living class members. A.145.

The court appeared to understand that potentially thousands of settlement class members will receive no compensation under the settlement and yet later be diagnosed with CTE. But the court took the view that the settlement “reasonably does not compensate Retired Players with the mood and behavioral symptoms allegedly associated with CTE.” A.140. The court did so without insisting on any mechanism to ensure that the settlement will be adjusted, if necessary, to reflect future scientific developments regarding CTE. A.136. It required only that the parties “confer in good faith about possible revisions to the definitions of Qualifying Diagnoses based on scientific developments.” *Id.*

**c. Attorneys’ Fees.** As to attorneys’ fees, the court found that the clear-sailing provision is “not problematic” and that “the uncontested fee award is not disproportionate.” A.89-90. Despite Rule 23(h), the court also excused class counsel’s refusal to file a fee petition, reasoning that any fee award will “not reduce the recovery available to the Class.” A.88. Although the court assured class members that they “will have an opportunity to submit objections to the proposed fee award,” it did not explain why anyone would have an incentive to do so after the settlement itself has been approved. A.134.

## SUMMARY OF ARGUMENT

**I.** If *Amchem Products v. Windsor* teaches us anything, it is that courts must police both substance (“the terms of the settlement”) and procedure (“the structure of the negotiations”) in tandem, to prevent compensation for the presently injured from being won at the expense of future claimants. 521 U.S. at 627. Courts must make sure that future claimants, before being bound, truly had a seat at the table.

**A.** The settlement terms here are proof that that did not happen. The settling parties have been unable to justify the mismatch at the heart of the deal: the disparate treatment between those diagnosed with CTE before, and those diagnosed after, the date of approval. The parties’ “proxy” theory—that other, rarer conditions may stand in for CTE—offers no justification for this disparity, and fails to account for the fact that many with CTE will get nothing. The same is true for scientific uncertainty, which is a reason to preserve, not extinguish, future claims. The only credible explanation for the disparity is also the simplest: the deal was achieved by sacrificing future claimants’ interests to the winds.

**B.** The negotiations’ structure also explains why this lopsided deal came to pass: The future claimants never had a truly independent voice. A committee of plaintiffs’ lawyers “appointed” subclass counsel from among their own ranks—with no court involvement—after the negotiations had begun. The early failure to bring in unconflicted counsel was never rectified. Instead, the lone plaintiff who gave his

consent to the settlement on behalf of thousands of future claimants was recruited by the same counsel—after the deal was worked out—and failed even to allege a future risk of CTE. A “representative” who abandons his most valuable claim in exchange for nothing is no representative at all.

**II.** If further confirmation were needed that the deal is a product of inadequate representation, it can be found in the parties’ attempt to delay scrutiny of attorneys’ fees until after final approval. “There was no excuse for permitting so irregular, indeed unlawful, a procedure.” *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). It not only violates Rule 23(h) but “borders on a denial of due process because it deprives objecting class members of a full and fair opportunity to contest class counsel’s fee motion.” *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-95 (9th Cir. 2010). The lawyers apparently plan to wait until after final approval to seek their nine-figure fee, at which point class members would lack an incentive (and perhaps even the right) to challenge it.

**III.** The “futures problem” presents considerable challenges. On remand, the parties and the court may consider a variety of solutions, such as the appointment of independent counsel, back-end opt-out rights, modification of the global release, and the creation of a fund for future CTE claims.

## STANDARD OF REVIEW

The district court’s certification of the class and approval of the settlement—including its “failure to follow the procedures required before approving a settlement-only class action”—is reviewed for abuse of discretion. *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 298 (3d Cir. 2005).

The Court’s review “is plenary, however, to the extent a threshold question of law . . . bears on [its] review.” *McNair v. Synapse Grp.*, 672 F.3d 213, 222 (3d Cir. 2012). “Whether an incorrect legal standard has been used” in granting class certification is likewise “an issue of law to be reviewed de novo.” *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 185 (3d Cir. 2015). Because “each requirement of Rule 23 must be met”—including adequacy of representation—“a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements.” *In re Constar Int’l Inc. Sec. Litig.*, 585 F.3d 774, 779 (3d Cir. 2009).

Indeed, Rule 23’s certification requirements “demand undiluted, even heightened, attention in the settlement context,” *Amchem*, 521 U.S. at 620, because the court “acts as a fiduciary” for absent class members. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (“*GM Trucks*”). Courts must be “even more scrupulous than usual in approving settlements where no class has yet been formally certified.” *Id.* at 805.

## ARGUMENT

### **I. Because the settlement’s terms and the structure of the negotiations both make clear that future-injury plaintiffs were inadequately represented, approval of this settlement must be reversed.**

This case implicates “the most difficult problem” in class-action settlements involving mass torts: How can a court ensure that any deal seeking to bind those “who do not now have claims, because injury has not been sufficiently manifested, but who may well have claims in the future,” complies with Rule 23, the Constitution, and fundamental notions of fairness? Geoffrey Hazard, *The Futures Problem*, 148 U. Pa. L. Rev. 1901, 1901 (2000). This problem is at the heart of the two leading Supreme Court cases on class-action settlements—*Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), which affirmed this Court in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In both cases, the Supreme Court decertified settlement classes constructed to release the rights of “holders of present and future claims.” *Id.* at 856.

The Court did so because the distinct interests of these two kinds of groups not only diverge but conflict: “for the currently injured, the critical goal is generous immediate payments,” but “[t]hat goal tugs against the interest of [future-injury] plaintiffs,” who may not “realize the extent of the harm they may incur,” and thus can’t know how much their future claims might be worth. *Amchem*, 521 U.S. at 626, 628. To guard against conflict, the Court has insisted on structural safeguards,

including adequate, independent representation of future-injury class members. In testing whether the necessary safeguards are in place, a court must assure itself—based on “a substantive inquiry into the terms of the settlement” and “a procedural inquiry into the negotiation process”—that the interests of all class members were truly represented. *GM Trucks*, 55 F.3d at 796. Only by “hom[ing] in on the settlement[’s] terms” and negotiation structure, as Judge Becker did in *Georgine* and *GM Trucks*, may a court assess whether class counsel and the named plaintiffs provided “fair and adequate representation for the diverse groups and individuals affected.” *Amchem*, 521 U.S. at 619, 627.

This Court has identified several “basic questions” (focusing on both substance and procedure) “that courts can ask to detect those cases settled” without adequately “protect[ing] the interests of the absentees.” *GM Trucks*, 55 F.3d at 806. On substance: Do the settlement terms reveal a “disparity between the currently injured and [future-injury] categories,” *Amchem*, 521 U.S. at 626, such that the settlement “trad[es] the claims of the latter group away in order to enrich the former group,” *GM Trucks*, 55 F.3d at 797? “Have major causes of action or types of relief sought in the complaint been omitted by the settlement?” *Id.* at 806. Is the settlement “accompanied by [the likelihood] of an enormous legal fee”? *Id.* at 801. On procedure: Were there insufficient “structural protections to assure that differently situated plaintiffs negotiate[d] for their own unique interests”? *Georgine*,



83 F.3d at 631. “Did the parties achieve the settlement after little or no discovery?” *GM Trucks*, 55 F.3d at 806.

Because the answer to each question is yes, this settlement cannot stand. Neither “the terms of the settlement” nor “the structure of the negotiations” provides this Court with any assurance that the interests of future-injury plaintiffs were really represented at the negotiating table. *Amchem*, 521 U.S. at 627.

**A. The settlement’s disparate treatment of present and future claimants cannot be justified.**

“The inadequacy of the representation” here “is apparent from examination of the settlement itself.” *Nat’l Super Spuds v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 (2d Cir. 1981). This settlement creates a massive “disparity between the currently injured and [future-injury] categories of plaintiffs,” *Amchem*, 521 U.S. at 626—the class’s “most salient conflict,” *Georgine*, 83 F.3d at 630. Under the settlement’s terms, if a class member died with CTE before April 22, 2015—that is, if he had a *current* CTE claim on the day of approval—his estate will receive up to \$4 million. But if a class member dies after April 22, 2015—that is, if he has a *future* CTE claim—his estate will “get no monetary award at all” for the very same injury. *Id.* Future-injury plaintiffs, in other words, are forced to release all “claims relating to CTE,” A.77, yet they “will never enjoy the [CTE] benefits of the settlement”—benefits that were obtained at their expense. *GM Trucks*, 55 F.3d at 797.

It is hard to think of more “conspicuous evidence” of “an intra-class conflict.” *Id.* When a “settlement treats [one group] quite differently from [another],” it has “serious implications for the fairness of the settlement and the adequacy of representation of the class.” *Id.* at 777. That is especially true here, where the disparate treatment concerns the one injury that triggered this flood of litigation in the first place: death with CTE—the “industrial disease” of the NFL. A.5410.

What explains this eye-popping disparity if not a conflict of interest? Why would class counsel, who previously called CTE “the most serious and harmful disease that results from NFL and concussions,” A.2237, insist on up to \$4 million in CTE compensation for those who have already died, but forever foreclose the possibility of CTE compensation for everyone else? Whose interest does that serve? How can we be sure that future CTE claims were not bargaining chips to benefit others?

The district court posited two justifications for the disparity. The lead justification was that “[a] prospective Death with CTE benefit would incentivize suicide because CTE can only be diagnosed after death.” A.144. Put differently, the court’s concern was that CTE claims are so valuable—and the settlement’s compensation for those who will be diagnosed with CTE in the future is so inadequate—that some class members will *kill themselves* for a chance to obtain the benefits. That justification is as perverse as it is fanciful. (It also ignores the fact

that increased risk of suicide is a *symptom* of CTE.) The size of the disparity cannot justify the disparity itself. And a court, even if motivated by paternalism, may not force someone to relinquish a right worth millions of dollars for nothing in return.

The district court’s second justification was that “a living Retired Player does not need a death benefit because he can still go to a physician and receive a Qualifying Diagnosis.” A.144. That justification, of course, conflicts with the first: A player who “does not need” CTE compensation would not need to kill himself for it. Logical contradictions aside, the court’s “proxy” theory fails even on its own terms. A.145. The court claimed that CTE’s symptoms (though currently “unknown,” A.136) are compensated by the other qualifying diagnoses: ALS, Alzheimer’s, dementia, and Parkinson’s. But, under the parties’ own actuarial estimates, only about 5,879 out of 21,070 total estimated class members (or less than 28%) will be compensated by the settlement for those diseases. A.1585. Here is the predicted breakdown (at *id.*):

<b>Disease</b>	<b>Estimated Number of Incidences</b>	<b>Percentage of Class</b>
ALS	31	0.15%
Parkinson’s	24	0.11%
Level 1.5 dementia	0 <sup>4</sup>	0.00%
Level 2 dementia	2,878	13.66%
Alzheimer’s	2,946	13.98%

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<sup>4</sup> The estimated numbers include no one in the Level 1.5 dementia category because everyone with dementia is “assumed to progress to Level 2.” A.1585.

By sharp contrast, researchers have identified CTE in roughly 96% of the former players whose brains they have examined (87 out of 91). Geier, *Will football players one day take medicine to prevent brain damage?*; see also A.2370. This means that more people have *already* been diagnosed with CTE than the total number expected to be compensated for ALS, Parkinson’s, and Level 1.5 dementia *combined*. Those diseases, it goes without saying, are not “proxies” for CTE.

Nor is Level 2 dementia or Alzheimer’s. Even if many people with CTE eventually advance to the most severe stage of the disease—at which point they are expected to suffer dementia and can presumably obtain Level 2 compensation—those people will receive only a fraction of the amount given to class members with current CTE claims. Indeed, although the district court believed that “the benefits for Death with CTE are not more generous than the benefits for those who received Qualifying Diagnoses while alive,” the settling parties’ own estimates show otherwise. A.145. The average payment for future dementia claims is \$190,000, while the average payment for current CTE claims is \$1.44 million. A.1573.

To explain this eightfold disparity, the district court reasoned that it is “because the alleged symptoms Death with CTE compensates did not begin when Retired Players died.” A.145-46. That is true. But the same could be said of *anyone* with a current qualifying disease. Someone with ALS, Alzheimer’s, Level 2 dementia, or Parkinson’s did not begin suffering on the day of final approval. Yet

the settlement provides a uniform pay structure for each of those diseases (including dementia), with no supplemental compensation for those who have suffered in the past. Why? If CTE were really intended as a proxy for dementia, it should be treated the same as dementia. It is not. That internal contradiction exposes the “proxy” theory for what it is: a pretext designed to mask a glaring disparity between class members with current CTE claims and class members with future CTE claims.

Even the lopsided numbers listed above fail to capture the full extent of the disparity because they assume that (a) everyone with CTE will make it to the disease’s final stages, and (b) the scientific understanding of CTE will not evolve in a way that casts doubt on the extent of the overlap between CTE and Level 2 dementia. In truth, however, hundreds if not thousands of class members will likely die with CTE before qualifying for Level 2 dementia—perhaps by killing themselves as a result of the disease. Based on current estimates, anywhere from 11% (if you believe the NFL’s expert) to 67% (if you believe the CTE experts) of class members eventually diagnosed with CTE will receive no compensation. A.3498, 2956. Yet these people will suffer some of the most pervasive and debilitating CTE-related symptoms, involving “behavioral and mood disorders” that are “as serious” as any of the covered diagnoses. A.2956. In many cases—one study put it at two-thirds—behavioral and mood disorders are the *sole* presenting

symptom of CTE, meaning that most former players who died with CTE could not have obtained a qualifying diagnosis before death. A.2955-56. And some, like Hall of Famer Junior Seau, who committed suicide in 2012, take their lives before they deteriorate any further. A.2919.

Why should someone in that situation—whose disease caused him to commit suicide—get nothing if he died on April 22, 2015, but up to \$4 million if he died the day before? The district court’s principal answer is that his injury should not be compensated because of the causation problems associated with mood and behavioral symptoms. A.143. Fair enough. But a CTE diagnosis changes that. And this still doesn’t explain why the settlement compensates behavioral injuries for those who died before April 22, 2015 (and at a higher rate than dementia, no less). So the district court put forth another answer: because those “who died before final approval would not have had sufficient notice of the need to obtain Qualifying Diagnosis.” A.145. But why can’t a player’s family obtain a qualifying diagnosis after death? And if they do, or if the player obtained a qualifying diagnosis before death (say, dementia or Alzheimer’s), why does he get *more* than the maximum amounts for those diseases if the behavioral injuries CTE causes have no value?

Far from establishing a fair compensation regime for CTE-related claims, the settlement’s framework eliminates recovery for the vast majority of them. Class members who suffer from debilitating mood and behavioral conditions related to

CTE (possibly for years) but who do not advance further up the scale will receive nothing. The same goes for those who ultimately die from CTE without having dementia.

That outcome is impermissible under Rule 23 and due process. Claims held by absent class members are a form of “property” under the Due Process Clause, and hence may not be arbitrarily extinguished. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). And courts have long recognized that the release of a claim “not shared alike by all class members” will render a settlement defective under Rule 23. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982). In *Amchem*, for instance, the Court refused to endorse a global settlement that “extinguished” certain types of future claims, including family members’ “loss-of-consortium claims” and exposed “enhanced risk of disease,” for “no compensation.” 521 U.S. at 603, 627. The Court determined that the settlement’s uncompensated sacrifice of these claims could not satisfy Rule 23’s requirements—regardless of whether the class representatives “may well have thought that the [s]ettlement serves the aggregate interests of the entire class.” *Id.* at 627; *see also Super Spuds*, 660 F.2d at 19 (“An advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice of claims of members.”).

This case is no different. Although the district court suggested that allowing future-injury plaintiffs to bring CTE claims would “pose[] a serious practical

problem” given the scientific uncertainties, A.85, “convenience and expediency cannot justify the disregard of the individual rights of even a fraction of the class,” *In re GM Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1133-35 (7th Cir. 1979). Here, the settlement “throw[s] to the winds” the claims of a huge percentage of the class. *Super Spuds*, 660 F.2d at 17 n.6. And it does so to reach a global resolution that benefits everyone else: the currently injured, the NFL, and class counsel.

Worse, these class members will “become bound to the settlement” even though they “lack adequate information to properly evaluate” it. *Georgine*, 83 F.3d at 633. The wide variation of CTE estimates in this case attests to that. Because any absent class member would have great “difficulty in forecasting what their futures hold,” *id.* at 631, any rational future-injury representative would insist on “an agreement that keeps pace with scientific advances,” as the district court explained. A.93. But this deal doesn’t do that. Instead, it “freez[es] in place the science of [2014],” *Georgine*, 83 F.3d at 631, by requiring only that the settling parties “meet at least every ten years and confer in good faith about possible modifications,” while giving the NFL veto power over “any prospective changes.” A.147.

Worse still, the uncertainty of the future creates especially “serious problems in the fairness” of this settlement, *Georgine*, 83 F.3d at 633, because it does not involve the small-dollar claims that Rule 23’s drafters had “dominantly in mind,”



*Amchem*, 521 U.S. at 617. Rather, this case “involves claims for personal injury and death—claims that have a significant impact on the lives of the plaintiffs and [could one day] receive huge awards in the tort system.” *Georgine*, 83 F.3d at 633. Each plaintiff thus “has a significant interest in individually controlling the prosecution of [his case]”; each ‘ha[s] a substantial stake in making individual decisions on whether and when to settle.’” *Amchem*, 521 U.S. at 616 (quoting *Georgine*, 83 F.3d at 633). Future-injury class members would thus “probably desire a delayed opt out like the one employed in *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 150 (S.D. Ohio 1992).” *Georgine*, 83 F.3d at 631. But here, too, class counsel came up short, instead bargaining for “an enormous legal fee,” *GM Trucks*, 55 F.3d at 801—further evidence that this settlement was beset with conflict, as discussed in Part II.

In short, the substance of this settlement should put this Court on high alert that future-injury class members did not receive fair and adequate representation. The settlement facially discriminates against them as to the one injury at the heart of this litigation—an injury the settlement itself values at up to \$4 million. The parties’ failure to justify the disparity leaves only one explanation: inadequate representation. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

**B. The settlement’s unjustified disparate treatment is the result of negotiations that lacked sufficient structural protections for future claimants.**

A “procedural inquiry into the negotiation process” confirms the inadequate representation here. *GM Trucks*, 55 F.3d at 796. This inquiry asks whether “the lawyers actually negotiating really were doing so on behalf of the *entire* class.” *Id.* at 797. It seeks “to ensure that absentees’ interests”—*all* absentees’ interests—were “fully pursued” during the negotiation process. *Georgine*, 83 F.3d at 630. This Court can find no such assurance in this case. Simply put, the settling parties “achieved a global compromise with no structural assurance of fair and adequate representation” for future-injury plaintiffs. *Amchem*, 521 U.S. at 627.

The trouble began almost immediately. When this case first went to mediation—and throughout the nearly two months of actual negotiation—the Plaintiffs’ Steering Committee pursued settlement without any judicially appointed subclass representatives or truly independent subclass counsel. Instead, the Committee negotiated with the NFL as a single bloc, purporting to represent the entire undifferentiated class. A.3578.

Eventually, however, the plaintiffs’ lawyers realized the flaw in their approach: it violated *Amchem* and *Georgine*, which hold that “presently injured class representatives cannot adequately represent the futures plaintiffs’ interests and vice versa.” *Georgine*, 83 F.3d at 631. So the lawyers devised a strategy to sidestep these

precedents. After the basic settlement terms had been reached, the lawyers self-designated one of their own members to purportedly represent future-injury plaintiffs. A.1116-17. And they named Corey Swinson, a former player with one season of NFL experience, to serve as the representative of these plaintiffs. A.3569. The district court played no role in these choices, and there is no suggestion in the record that the court was even asked to appoint outside counsel.

After Swinson died, the plaintiffs' lawyers forged ahead with the settlement for a month without any representative of the future-injury plaintiffs. A.3569. Then they brought Shawn Wooden to their offices, disclosed the settlement terms to him, assured themselves that he would "support[] the settlement," and named him as the proposed representative of all future-injury plaintiffs. A.3902.

There is no indication that this process contained the necessary safeguards to protect the interests of future-injury absentees—particularly in light of the deal's substantive unfairness toward those absentees (as discussed earlier). "[T]he fact that plaintiffs of different types were among the named plaintiffs does not rectify the conflict." *Georgine*, 83 F.3d at 631. What is necessary is that there be sufficient "structural protections to assure that differently situated plaintiffs negotiate for their own unique interests." *Id.* As the Supreme Court explained in *Amchem*, if future-injury class members are to be "bound to a settlement," the court must ensure itself—at the very minimum—that they are represented by truly independent

counsel and a named plaintiff who can provide meaningful “consent” and “who understand[s] that [his] role is to represent solely the members of [his] respective subgroup[].” 521 U.S. at 627 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992)).

That did not happen here. As in *Amchem*, the district court “did not appoint additional class counsel, nor did it take any other procedural steps to protect the rights of the future class members in the settlement negotiation process or during the process leading up to the fairness hearing.” Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 479 (1996). Nor did the court even question after-the-fact that “[e]ach Subclass ha[d] its own independent counsel” during the negotiations, devoting only that one sentence to the topic. A.93.

“Far too much turns on the adequacy of representation to accept it on blind faith.” *GM Trucks*, 55 F.3d at 797. On this record, there is simply no way to verify that the interests of Wooden’s lawyer were really independent of the interests of the Steering Committee of which he was a part. To take just a few questions: Does the lawyer plan to seek compensation for the time he previously spent as counsel for presently injured plaintiffs? If so, how much? How much time did he spend working on the case after the Steering Committee appointed him as “futures” counsel? What work did he do? What portion of the potential \$112.5 million fee

award will he seek? We don't know any of these answers, however, because the plaintiffs' lawyers have withheld their fee petition until *after* final approval of the settlement—an independent ground for reversal, as discussed in the next section.

Then there are the class representatives. As the representative of the proposed future-injury subclass, Wooden played no part in the negotiations and, given the timing, could not possibly have “underst[ood]” that his “role [was] to represent solely the members of [his] respective subgroup” *during* negotiations. *Amchem*, 521 U.S. 627. He thus could not have consented to this deal under *Amchem*, and he failed to “negotiate for [his] unique interests.” *Georgine*, 83 F.3d at 631.

Nor does it matter that the lawyers tried to satisfy *Amchem* through Mr. Swinson. Installing him only after negotiations began (and after the architecture of the settlement had begun to take shape) is “equivalent to closing the barn door after the horses have escaped.” *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226, 233 n.12 (S.D. W. Va. 1997). For subclasses to be effective in assuring structural fairness and protecting unnamed class members, they must be established “prior to settlement.” *Id.* That way, class members and courts can be confident that a “global resolution” fairly and adequately addresses “the interest of each subclass.” *Id.* Future claimants require this safeguard because “those without current afflictions may not have the information or foresight needed to decide, intelligently,

whether to stay in or opt out.” *Amchem*, 521 U.S. at 628; *see also In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 250-53 (2d Cir. 2011).

The timing of the subclass and named representative designations are not the only problem. When Wooden was designated, he omitted his CTE-related future claims. A.1126, 3823. That decision is not, as the district court thought, a mere technical omission. *See* A.94. A named plaintiff who, in effect, “waive[s] or abandon[s]” certain claims held by absent class members is categorically “inadequate as [a] class representative.” *In re MBTE Prods. Liability Litig.*, 209 F.R.D. 323, 339-40 (S.D.N.Y. 2002). By the same token, “[a] class representative is not an adequate representative when [he] abandons particular remedies to the detriment of the class.” *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 550 (D. Minn. 1999). A named plaintiff “cannot maintain a class action without seeking all available remedies for the class members,” when “he refuses to seek all available remedies even for himself.” *Drimmer v. WD-40 Co.*, No. 06-cv-900, 2007 WL 2456003, at \*3 (S.D. Cal. 2007).

This flaw is fatal to the settlement because the “linchpin of the adequacy requirement” is the “alignment of interests and incentives between the representative plaintiffs and the rest of the class.” *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012). For intra-class conflicts that are allocative in nature, the key concern is that the representative plaintiffs will have an incentive

“to shift the dividing line” between claims “to maximize their own recovery, at the expense of other members of the class who lacked a representative to protect their interests.” *Id.* at 187 n.15. In *Dewey*, this Court rejected a proposed class subdivision where none of the “representative plaintiffs” protected the interests of a distinct group of class members. *Id.* at 187-89. “The problem” with a proposed settlement class that includes no named plaintiff to represent a distinct group of class members, the Court explained, “is that the interests of the representative plaintiffs and the interests of the [unrepresented] group” will be “align[ed] in opposite directions.” *Id.* at 188. “Representative plaintiffs” will have an incentive “to draw the [compensation] line just beneath” their claims, while feeling free to release those claims of unrepresented class members. *Id.* “This is precisely the type of allocative conflict of interest that” *Amchem* seeks to avoid. *Id.*<sup>5</sup>

The “structure of the settlement agreement” here illustrates the point. *Id.* at 187. The named class representatives—one of whom has the only injury worth more than CTE (Turner, with ALS) and thus had no incentive to seek future CTE compensation, and the other of whom declined to press future CTE-related claims—“drew a line delineating the boundaries between” those claims that could

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<sup>5</sup> See also Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649, 1684 (2008) (explaining that intra-class conflicts “that matter” are “those that give rise to a significant potential for negotiation on behalf of an undifferentiated class to skew in some predictable way the design of class-settlement terms in favor of one or another subgroup for reasons unrelated to evaluation of the relevant claims”).

trigger recovery and those that could not. *Id.* As in *Dewey*, “[i]t was this line-drawing exercise that exacerbated the adequacy problem here” because the named representatives “had an incentive to draw the dividing line” so that their potential claims would be compensated even if other absent members’ claims were not. *Id.* at 188. As a result, this settlement fails Rule 23’s adequacy and fairness requirements.

**II. The attorney-fee-deferral procedure, which insulates any fee request from meaningful scrutiny, is unlawful and provides an independent ground for reversal under this Court’s precedent.**

The unusual fee arrangements here—which include procedures designed to insulate class counsel’s nine-figure fees from any meaningful scrutiny—further confirm the inadequate representation of the class, and alone warrant reversal.

Counsel’s failure to file a fee petition leaves many questions unanswered. Among them: How much time did class counsel spend on this litigation? How much effort was put into investigating the case? To what extent would counsel’s fees represent a windfall, heightening concerns about inadequate representation? Do the fee arrangements reveal additional conflicts of interest—for example, will counsel for the futures subclass seek fees for previously representing present-injury claimants? How compromised is class counsel by generous contingency-fee arrangements with only present-injury claimants? No settlement may be lawfully approved when such critical questions remain unanswered.



**A. *The unlawful attorney-fee deferral procedure.*** The attorney-fee-deferral procedure here violates a clear rule of this Court’s precedent: “[A] thorough judicial review of fee applications is required in *all* class action settlements.” *GM Trucks*, 55 F.3d at 819 (emphasis added). Despite that categorical rule, the district court approved the settlement here without requiring class counsel to first file a fee motion. Instead, counsel was permitted to defer the motion—and any disclosure of the rationale or support for their eventual fee request—until after objections, final approval by the district court, and a decision by this Court. In so doing, “the District Court abdicated its responsibility to assess the reasonableness of attorneys’ fees proposed under a settlement of a class action, and its approval of the settlement must be reversed on this ground alone.” *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980).

“There was no excuse for permitting so irregular, indeed unlawful, a procedure.” *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). The district court apparently believed it was acceptable to approve the settlement without judicial review of fees because the class members “will be free to contest” any fee request at a later date, and because the award would “not reduce the recovery available to the Class.” A.87-88. But the latter rationale is the very one this Court rejected in *GM Trucks*; there, too, the district court had tried to “rationaliz[e] its initial refusal to review the fee” motion before final approval on

the theory that reductions to the fee “will in no way reduce the recovery to any of the settlement class members.” 55 F.3d at 819. That is wrong as a matter of both economics and circuit precedent. As this Court recognized long ago, “a defendant is interested only in disposing of the total claim asserted against it; . . . the allocation between the class payment and the attorneys’ fees is of little or no interest to the defense.” *Id.* at 819-20 (quoting *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977)). Judge Posner recently made the same point in condemning the deferral procedure. Fees, he explained, “represent an integral part of the overall amount that the settling party is willing to pay.” *Redman*, 768 F.3d at 958. When counsel refuses to file a motion, “class members cannot determine the possible influence of attorneys’ fees on the settlement in considering whether to object to it.” *Id.*

The deferral procedure also runs afoul of the federal rules. For any fee motion in a class-action settlement, Rule 23(h) mandates that “[n]otice of the motion must be . . . directed to class members” and that that “[a]ny class member may object to the proposal.” Fed. R. Civ. P. 23(h). “The plain text of the rule requires that any class member be allowed an opportunity to object to the fee ‘motion’ itself.” *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010). When a settlement is proposed, the rule contemplates that “notice of class counsel’s fees motion should be combined with notice of the proposed settlement.”

Fed. R. Civ. P. 23(h)(1), 2003 advisory committee’s note. The drafters emphasized that “it would be important to require the filing of at least the initial motion in time” for the class to receive notice and have the opportunity to object along with the proposed settlement. *Id.* These requirements were violated here. *See Redman*, 768 F.3d at 637 (rule violated where “[c]lass counsel did not file the attorneys’ fee motion until after the deadline set by the court for objections to the settlement had expired”).

Deferral of the fee motion also violates due process “because it deprives objecting class members of a full and fair opportunity” to object. *Mercury Interactive*, 618 F.3d at 993. Even where the total potential fee request is disclosed, class members are “handicapped in objecting” to the settlement without knowing “the details of class counsel’s hours and expenses” and “the rationale that would be offered for the fee request.” *Redman*, 768 F.3d at 638. To avoid this problem, courts require that “class action settlement notices must contain the maximum amount of attorney’s fees sought by class counsel and specify the proposed method of calculating the award” *before* any settlement can be approved. *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 957 (Tex. 1996); *see also GM Interchange Litig.*, 594 F.2d at 1130 (“All amounts to be paid by the defendant(s) are properly part of the settlement funds and should be known and disclosed at the time the fairness of the settlement is considered.”). That didn’t happen here either.

**B. The deferral procedure, coupled with the clear-sailing clause, effectively insulates the fees from future review.** To make matters worse, the settlement also contains a “clear-sailing” clause barring the NFL from ever contesting class counsel’s fees—including the up-front award of up to \$112.5 million, an additional 5% of class members’ recoveries, and an undisclosed amount of contingency fees (typically, at least 33% of the total recovery). This clause, together with the deferral procedure, results in even greater insulation of the fees.

For starters, “the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class,” and “should put a court on its guard.” *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991); see William Henderson, *Clear Sailing Agreements: A Special Form of Collusion*, 77 Tulane L. Rev. 813 (2003). As this Court has explained, such a clause highlights the “danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.” *GM Trucks*, 55 F.3d at 820. Such clauses “weigh substantially against the fairness of a settlement and call for intense critical scrutiny” by reviewing courts. *In re Sw. Airlines Voucher Litig.*, — F.3d —, 2015 WL 4939676, \*10 (7th Cir. Aug. 20, 2015).

But the settlement here makes that “intense critical scrutiny” unlikely, thwarting judicial review by design. The NFL will be contractually bound not to

challenge any fee claim. Because the fees would no longer affect their recoveries, class members would lose the incentive to challenge the fees after final approval. And, even if a class member were to mount such a challenge, the parties might argue that the class member lacks standing to appeal.<sup>6</sup> As a result, the class would likely be deprived of the benefits of both objector participation and judicial review while class counsel is guaranteed hundreds of millions of dollars. There's only one reason for such an arrangement: "to insulate a fee award from attack." Charles Silver, *Due Process and the Lodestar Method*, 74 Tulane L. Rev. 1809, 1839 (2000).

Three decades ago, the Seventh Circuit and the Federal Judicial Center's Manual for Complex Litigation both condemned arrangements under which the fee is to be set "after the class settlement has been approved," warning that they "neutralize the court's power and ability to pass upon the reasonableness of the amounts to be paid to plaintiffs' counsel." *GM Interchange Litig.*, 594 F.2d at 1130-31 (quoting Manual). Under such an arrangement, there is "little incentive for the judge to reduce the agreed upon fees" and no incentive for anyone to challenge them. *Id.* at 1131.

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<sup>6</sup> Compare *Silverman v. Motorola, Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) (no standing for objector who only challenges attorneys' fees without challenging settlement when objector cannot benefit from fee reduction) and *Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084 (9th Cir. 2011) (same) with *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 n.9 (9th Cir. 2011) (objectors who challenge fee as part of challenge to Rule 23(e) approval of \$0 settlement have appellate standing).

**C. What is known about the fee arrangements heightens concerns about adequacy of representation.** Class counsel’s efforts to eliminate meaningful judicial review is all the more troubling given the astronomical nature of the likely fee request compared to the amount of work done. Assuming a generous average rate of \$600 per hour (for all work by partners, associates, and paralegals), \$112.5 million in fees would equate to 187,500 hours of time—the equivalent of 21.4 years. That is a surprising recovery for litigation that entailed briefing on a motion to dismiss, no formal discovery, and a few months of mediation. Given the lack of fee records, there is a very real possibility that “class counsel effected a settlement that would yield very substantial rewards to them after what, in comparison to the [\$112] million fee, was little work.” *GM Trucks*, 55 F.3d at 803.

These numbers do not even account for the additional fees counsel stand to gain. In addition to the free pass on \$112.5 million, the lawyers may also obtain 5% of each class members’ recovery—potentially resulting in yet another windfall. That 5% is ostensibly for ongoing administrative costs, to be spent at counsel’s discretion. But, as Judge Posner has noted, “the invocation of administrative costs as a factor warranting increased fees” makes the absence of information “a matter of particular significance.” *Redman*, 768 F.3d at 638. Without this information, how

can any class member assess whether this is a wise expense or merely a slush fund for the lawyers?

Finally, the settlement allows the lawyers to enforce any contingency-fee contracts they have with class members who are able to recover on the grid—on top of the \$112.5 million and the 5% setoff. It is difficult to estimate how much more this will add to the lawyers’ pockets because the agreements have not been disclosed. But the amounts are likely substantial. Contingency fees in injury cases are typically 33% of damages after expenses, and that appears to be the case for at least some of the class members here. *See, e.g.*, Letter from Mrs. Daniel Brabham, Nov. 5, 2014, Dkt. No. 6356 (complaining that counsel “is also entitled to 1/3 of what may be awarded to me and my three children.”).

Although there is no per se bar on such arrangements, they may indicate a conflict of interest and, in turn, inadequate representation. *Cf. Ortiz*, 527 U.S. at 852-53. The arrangements here are presumably with present-injury claimants, not future claimants. Thus, class counsel stands to gain far more from payouts for present-injury claims than for future-injury claims. The existence of this compensation source may undermine “any assumption that plaintiffs’ counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class.” *Id.* Such “side settlements suggest that class counsel has been laboring under an impermissible conflict of interest and that it may have preferred

the interests of current clients to those of the future claimants in the settlement class.” *Id.* At a minimum, counsel should disclose the details. *See* Fed. R. Civ. P. 23(h), 2003 advisory committee’s note (noting that “individual fee agreements between class counsel and class members might have provisions inconsistent with” the goal of fairness to the class); Fed. R. Civ. P. 54(d)(2)(B)(iv) (authorizing required disclosure of “the terms of any agreement about fees for the services for which the claim is made”); *Manual for Complex Litigation* § 13.23 (4th ed. 2007) (“In presenting settlement agreements for judicial approval . . . the parties are obliged to make full disclosure of all terms and understandings, including any side agreements.”).

Taken together, these defects expose this settlement for what it is: a device designed to eliminate liability for the single biggest threat to the NFL—future accountability for an impending tsunami of CTE-related claims. Everyone wins but the future-injury class members. No court may approve a class settlement if the named class representatives and their counsel do not “possess the same interest . . . as the class members.” *Amchem*, 521 U.S. at 594. Yet that is exactly what happened here.

### **III. Alternatives are available on remand.**

As the defects in this settlement illustrate, the quest to bind future claimants to a class-action settlement along with present-injury claimants presents many



challenges. On remand, the parties and the district court should consider several alternatives to address this problem:

***Appoint independent counsel:*** To prevent conflicts of interest among counsel and ensure adequate representation, the district court could appoint truly independent counsel to represent the future-injury subclass in any settlement negotiations—at a minimum, “someone who represents no presently injured claimants.” Wolfman & Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. at 477. This “separate representation” requirement should prohibit “an attorney who represents another class against the same defendant” from “serv[ing] as class counsel.” *Ortiz*, 527 U.S. at 856; *see Dewey*, 681 F.3d at 190 (suggesting that, on remand, adequacy problems could be resolved through separate representation of subclasses).

***Exclude future claims from the release.*** The parties might also narrow the terms of the release to permit class members who develop CTE-related injuries in the future to press their claims and seek compensation. In *Super Spuds*, Judge Friendly refused to endorse a view of Rule 23 or due process that would allow named plaintiffs to give up different claims of absent class members. 660 F.2d at 17. Here, because the named “futures” representative declined to press a CTE claim, the scope of any release of future claims could be so limited, and future CTE claims could be excluded. *See In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112,

125 (E.D. La. 2013) (approving release that would not cover later-manifested physical conditions arising from exposure).

**Compensate CTE with evolving diagnostic criteria.** A third option would be to create a CTE qualifying diagnosis. This would allow players who are later diagnosed with CTE to get compensation. To account for the changing science, the settlement could establish a framework for constant reevaluation of the diagnostic criteria related to CTE. And unlike the current settlement—which gives the NFL a unilateral veto—the settlement could authorize an objective committee of scientists to approve changes and “keep pace with the changing science and medicine.” *Georgine*, 83 F.3d at 630-31.

**Provide back-end opt-out rights.** Finally, the use of “sturdy back-end opt out rights” has been recognized as a “rational[]” means for future-only class members to protect “distant recoveries,” *Amchem*, 521 U.S. at 610, and “safeguard their ultimate right to resort to the tort system,” *In re Asbestos Litig.*, 90 F.3d 963, 972-73 (5th Cir. 1996); *see, e.g., Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 150 (S.D. Ohio 1992).<sup>7</sup> In the recent BP/Deepwater Horizon Medical Settlement, for example, all class members had the right to a back-end opt-out regardless of

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<sup>7</sup> This mechanism has been embraced by several scholars. *See* John C. Coffee, Jr., *Class Action Accountability*, 100 Colum. L. Rev. 370, 433 (2000); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv. L. Rev. 747, 800-01 (2002); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 368-70 (1999); John C. Coffee, Jr., *Class Wars*, 95 Colum. L. Rev. 1343, 1448-53 (1995).

whether they recovered in the present. There was “no ‘future’ injury released by the Settlement”—and hence no concern that absent class members’ undeveloped claims would be extinguished. *See In re Oil Spill*, 295 F.R.D. at 140. Because all class members retained the opt-out right, even those with current claims had “every incentive to protect the interests” of futures-only claimants—a point with which Dean Klonoff (who was also an expert there) agreed. *Id.*

The settlement in this case failed to follow any of these, or any other, blueprints to address the problem of future injuries. On remand, the parties and the district court should study how courts and parties in other cases have handled this crucial issue.

## **CONCLUSION**

The district court’s approval of the settlement should be reversed.

Respectfully submitted,

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## COMBINED CERTIFICATIONS

**1. BAR MEMBERSHIP:** I certify that I am a member of this Court's bar.

**2. WORD COUNT, TYPEFACE, AND TYPE STYLE.** I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure of 32(a)(7)(B) because the brief (as indicated by my word processing program, Microsoft Word) contains 13,676 words, excluding those portions excluded under Rule 32(a)(7)(B)(iii). I also certify that this brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type style requirements because this brief has been prepared in the proportionally spaced typeface of 14-point Baskerville.

**3. SERVICE:** I certify that on September 14, 2015, I am causing this brief to be filed electronically with this Court's CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

**4. PAPER COPIES:** I certify that the text of the electronic version of this brief is identical to the text in the paper copies that will be delivered to the Court.

**5. VIRUS CHECK:** I certify that I have performed a virus check using Sophos antivirus, and that no virus was detected.

September 14, 2015

/s/ Deepak Gupta  
Deepak Gupta

## **Appendix—Biographies of the Appellants (Armstrong Objectors)**

**RAYMOND ARMSTRONG** played one season as a defensive tackle with the Oakland Raiders. He began his professional football career after playing for Texas Christian University. Mr. Armstrong retired from the old AFL after the 1960 season.

**LARRY E. BARNES** played two seasons for the San Francisco 49ers and Oakland Raiders as a running back and kicker. He began his professional football career in 1957 after playing for Colorado State University. Mr. Barnes retired from the old AFL after the 1960 season.

**LARRY BROWN** played eight seasons as a defensive back with the Dallas Cowboys and Oakland Raiders. He played on three Super Bowl Championship teams with the Dallas Cowboys (XXVII, XXVIII, and XXX), and was named MVP of Super Bowl XXX. He was also named to the NFL all-rookie team. Mr. Brown began his professional football career in 1991 after playing for Texas Christian University. Mr. Brown retired from the NFL after the 1998 season. He is a cohost of the Dallas Cowboys Radio Network Pregame and Postgame Shows on the Dallas Cowboys Radio Network.

**DREW COLEMAN** began his professional football career in 2006 after playing cornerback for the Texas Christian University Mountain West Conference Championship team. He played four seasons with the New York Jets and one season with the Jacksonville Jaguars. Mr. Coleman retired from the NFL after the 2011 season.

**KENNETH DAVIS** played nine seasons as a running back with the Green Bay Packers and Buffalo Bills. He played in four consecutive Super Bowls (XXV, XXVI, XXVII and XXVIII) with the Buffalo Bills. Mr. Davis began his professional football career in 1986 after playing for Texas Christian University, where he was first team All-American and had the fifth most votes of all candidates for the Heisman Trophy as a junior. Mr. Davis retired from the NFL after the 1994 season. He is the Athletic Director and former head football coach at Bishop Dunne Catholic School in Dallas, Texas.

**DENNIS DEVAUGHN** was captain of the Bishop College football team and named MVP of the 1981 Sheridan Black College All-Star game. He played defensive back for the Philadelphia Eagles for two years (1982-1983). After retiring from professional football, Mr. DeV Vaughn helped found, and became President of,

Athletes for Change, an organization that provides treatment services to youth with emotional or behavioral disorders.

**WILLIAM B. “BILL” DUFF** played one season as a defensive tackle with the Cleveland Browns, and one season with the Berlin Thunder of NFL Europe. He began his professional football career in 1999 after playing for the University of Tennessee—where he was co-captain in 1997. After retiring from professional football, Mr. Duff hosted the television show “Human Weapon” on the History Channel. He is currently an executive with the Hard Rock Rocksino in Northfield Park, Ohio.

**WILLIAM E. “WILD BILL” DUTTON** (deceased, by his daughters, Appellants Mary Hughes and Barbara Scheer) played one season as a halfback for the Pittsburgh Steelers. He played college football at the University of Pittsburgh where he was third in the nation in rushing in 1942. Mr. Dutton was drafted in the third round by the Washington Redskins in 1943, but went into the service before he played a down. After World War II, Mr. Dutton played the 1946 season for the Pittsburgh Steelers. He was released by the Steelers in 1947 and, after a brief stint with the NFL New York Yankees, retired from professional football in 1947.

**KELVIN MACK EDWARDS, SR.** was a wide receiver for the New Orleans Saints and Dallas Cowboys from 1986 through 1988. He played college football at Liberty University.

**PHILLIP E. EPPS** was a wide receiver for the Green Bay Packers (1982-1988) and New York Jets (1989). He played college football at Texas Christian University. He retired from the NFL after the 1989 season.

**GREGORY EVANS**, a safety, played two seasons with the Buffalo Bills (1994-1995) and one season with the Washington Redskins (1998). He retired from the NFL after the 1998 season. Mr. Evans is an Emergency Medical Services Lieutenant with the City of Dallas Fire and Rescue Department. He also holds certifications as a state certified firefighter and paramedic.

**CHARLES LEWIS HALEY, SR.** played college football at James Madison University where he was a defensive starter and twice earned All-American honors. Mr. Haley, a linebacker and defensive end, played for five Super Bowl Championship teams. He played for the San Francisco 49ers from 1986-1991 and 1998-1999, winning two Super Bowls (XXIII and XXIV). He also played for the Dallas Cowboys from 1992-1996, where he won three Super Bowls (XXVII, XXVIII, and XXX). Mr.

Haley was named to the Pro Bowl five times and was an All-Pro selection twice. He retired after the 1999 season. For his accomplishments, Mr. Haley was inducted into the Pro Football Hall of Fame in 2015. He was also inducted into the College Football Hall of Fame in 2011 and the Virginia Sports Hall of Fame in 2006, and was enshrined into the Dallas Cowboys Ring of Honor in 2011.

**ALVIN HARPER** played college football at the University of Tennessee. He was a first round draft pick of the Dallas Cowboys in 1991 after earning All-Southeastern Conference First Team honors in 1990 and being named MVP of the 1991 Hula Bowl. As a wide receiver, Mr. Harper helped lead the Dallas Cowboys to back to back Super Bowl Championships (XXVII and XXVIII). After playing for the Cowboys for four seasons, Mr. Harper played one year each for the Tampa Bay Buccaneers, Washington Redskins, and New Orleans Saints. He returned to Dallas for his final NFL season in 1999.

**JAMES GARTH JAX** played ten seasons as a linebacker and special teams player with the Dallas Cowboys and Arizona Cardinals. He began his professional football career in 1986 after playing for Florida State University. Mr. Jax retired from the NFL after the 1995 season. For three years after his retirement, Mr. Jax served as the Arizona Cardinals coordinator of NFL programs and community outreach. He is currently an executive with Copper State Bolt & Nut Company and a motivational speaker.

**ERNEST JONES** was drafted by the Los Angeles Rams in 1994 and played in the NFL for six seasons. Mr. Jones also was a defensive lineman for the New Orleans Saints, Carolina Panthers, and Denver Broncos on the Super Bowl XXXII Championship team. Since retiring from the NFL in 2000, Mr. Jones has worked as a personal trainer for young athletes in Chandler, Arizona.

**MIKE KISELAK** played one season with the Dallas Cowboys as an offensive lineman in 1998. Prior to his NFL career, he played for the University of Maryland, where he was named the Atlantic Coast Conference Offensive Lineman of the Week in October 1989. Mr. Kiselak is a minister and a member of the board of directors for Kids Matters International.

**DWAYNE LEVELS** played college football at Oklahoma State University. He was a linebacker for the Cincinnati Bengals in 2002 and 2003.

**DARRYL GERARD LEWIS** played college football at the University of Texas at Arlington. He played one season as tight end for the Cleveland Browns in 1984.



**GARY WAYNE LEWIS** played college football at the University of Texas at Arlington. A second round draft pick by the Green Bay Packers in 1981, he played four seasons in the NFL as a tight end. Mr. Lewis retired from the NFL after the 1984 season.

**JEREMY LOYD** played college football at Iowa State University. He played two seasons as a linebacker for the St. Louis Rams, retiring from the NFL after the 2005 season.

**LORENZO LYNCH** was a cornerback and safety for the Chicago Bears, Arizona Cardinals, and Oakland Raiders. He played eleven seasons before retiring from the NFL after the 1997 season.

**DAVID MIMS** played college football at Baylor University. He was signed by the Atlanta Falcons in 1993 as an undrafted free agent. Mr. Mims played wide receiver for the Atlanta Falcons in 1993 and 1994, retiring from the NFL after the 1994 season.

**MICHAEL MCGRUDER** played nine seasons as a defensive back with the Green Bay Packers, Miami Dolphins, San Francisco 49ers, Tampa Bay Buccaneers, and the New England Patriots, with whom he played in Super Bowl XXXI. Before his NFL career, he played three seasons in the Canadian Football League with the Saskatchewan Roughriders. Mr. McGruder received the NFL Extra Effort Award and was a finalist for the NFL Bart Starr Award in 1997. He began his NFL professional football career in 1989 after starting four years at Kent State University, where he was captain of the football team his senior year, and a 2-year captain of the track team. Mr. McGruder retired from the NFL after the 1997 season. In 2009, Mr. McGruder founded Platinum Charities, a charitable organization dedicated to motivating at-risk youth and empowering disadvantaged families to reach higher levels of achievement.

**TIM MCKYER** played college football at the University of Texas at Arlington. A cornerback, he was a third-round draft pick of the San Francisco 49ers in 1986. Mr. McKyer played for the 49ers (1986-1989), Miami Dolphins (1990), Atlanta Falcons (1991-1992), Detroit Lions (1993), Pittsburgh Steelers (1994), Carolina Panthers (1995), Atlanta Falcons (1996), and Denver Broncos (1997). He was a member of three Super Bowl Championship teams in 1988 and 1989 (San Francisco), and 1997 (Denver) (XXII, XXIII, and XXXII, respectively). Mr. McKyer, a two-time All Pro, retired from the NFL after the 1997 season.

**NATHANIEL NEWTON, JR.** played fourteen seasons as an offensive lineman with the Dallas Cowboys and Carolina Panthers. Before his NFL career, he played two years for the Tampa Bay Bandits in the United States Football League. Mr. Newton was a six-time Pro Bowl selection, was twice named All-Pro, and played on three Super Bowl Championship teams with the Dallas Cowboys (XXVII, XXVIII, and XXX). He also was named to the USFL All-Time Team. Mr. Newton began his NFL professional football career in 1986 after playing for Florida A&M University, where he was first team All-MEAC as a senior. Mr. Newton retired from the NFL after the 1999 season. He is a radio and television broadcaster in Dallas, Texas.

**CLIFTON L. ODOM** played thirteen seasons as a linebacker with the Cleveland Browns, Baltimore and Indianapolis Colts, and Miami Dolphins. Mr. Odom began his professional football career in 1980 after playing for the University of Texas at Arlington. Mr. Odom retired from the NFL after the 1993 season.

**EVAN OGLESBY** originally signed with the Buffalo Bills in 2005 as an undrafted free agent. Thereafter, Mr. Oglesby played six seasons as a cornerback for the Baltimore Ravens, Dallas Cowboys and Miami Dolphins. Mr. Oglesby retired from the NFL after the 2010 season.

**SOLOMON PAGE** played college football at West Virginia University. Mr. Page, an offensive lineman, was drafted in the second round by the Dallas Cowboys in 1999. During his career with the Dallas Cowboys (1999-2002), he played both right guard and right tackle. Mr. Page played with the San Diego Chargers in 2003, after which he retired from the NFL.

**HURLES SCALES** played two seasons as a defensive back for the St. Louis Cardinals, Chicago Bears and Green Bay Packers. He retired from the NFL after the 1975 season. Mr. Scales previously served as First Vice President of the National Football League Players Association Dallas, Texas Chapter.

**KEVIN REY SMITH** played college football at Texas A&M University where he was a member of two Southwest Conference Championship teams. He was an All-Southwest Conference selection for three years, and a 1991 consensus All-American. Mr. Smith, a first round draft pick, played his entire NFL career as a cornerback with the Dallas Cowboys (1992-2000)—including three Super Bowl Championship teams (XXVII, XXVIII, and XXX). Mr. Smith retired after the 2000 season. He was inducted into the Texas A&M Athletic Hall of Fame in 1997.

**WILLIE T. TAYLOR** played one season as a wide receiver for the Green Bay Packers. He began his professional football career after playing for the University of Pittsburgh. Mr. Taylor retired from the NFL after the 1978 season.

**GEORGE TEAGUE**, a first-round pick in the 1993 NFL Draft, played nine seasons as a defensive back with the Green Bay Packers, Dallas Cowboys, and Miami Dolphins. Mr. Teague retired from the NFL after the 2001 season. e began his professional football career after playing for the University of Alabama. In 2002, he started the George Teague & Friends Foundation, a charitable organization focusing on youth development programs that involves many former University of Alabama football players. He is the Director of Athletics and Physical Education and Head Football Coach for the Shelton School in Dallas, Texas.

**CURTIS BERNARD WILSON** played college football at the University of Houston and Texas A&I University at Kingsville. Mr. Wilson, an undrafted free agent, played defensive back for the San Diego Chargers.

# Exhibit DD

Nos. 15-2272, 15-2294

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**In the United States Court of Appeals  
for the Third Circuit**

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**IN RE NATIONAL FOOTBALL LEAGUE PLAYERS  
CONCUSSION INJURY LITIGATION**

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania

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**REPLY BRIEF OF APPELLANTS RAYMOND ARMSTRONG,  
LARRY BARNES, LARRY BROWN, DREW COLEMAN, KENNETH DAVIS,  
DENNIS DeVAUGHN, WILLIAM B. DUFF, KELVIN MACK EDWARDS, SR.,  
PHILLIP E. EPPS, GREGORY EVANS, CHARLES L. HALEY, SR., ALVIN HARPER,  
MARY HUGHES, JAMES GARTH JAX, ERNEST JONES, MICHAEL KISELAK,  
DWAYNE LEVELS, DARRYL GERARD LEWIS, GARY WAYNE LEWIS,  
JEREMY LOYD, LORENZO LYNCH, MICHAEL McGRUDER, TIM MCKYER,  
DAVID MIMS, NATHANIEL NEWTON, JR., CLIFTON L. ODOM, EVAN OGELSBY,  
SOLOMON PAGE, HURLES SCALES, JR., BARBARA SCHEER, KEVIN REY SMITH,  
WILLIE T. TAYLOR, GEORGE TEAGUE, AND CURTIS BERNARD WILSON**

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# TABLE OF CONTENTS

Table of authorities ..... ii  
Introduction ..... 1  
Argument ..... 5  
    I. Because class counsel have not affirmatively demonstrated that the  
        settlement’s terms and negotiation structure establish adequate  
        representation, reversal is required. .... 5  
    II. The settlement’s unlawful fee-deferral procedure deprives this  
        Court of a critical tool for assessing the adequacy of class counsel’s  
        representation of the future-injury claimants, independently  
        warranting reversal..... 13  
Conclusion ..... 23  
Combined certifications

## TABLE OF AUTHORITIES

### Cases

<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997) .....	<i>passim</i>
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013) .....	6
<i>Georgine v. Amchem Products, Inc.</i> , 83 F.3d 610 (3d Cir. 1996) .....	<i>passim</i>
<i>Halliburton Co. v. Erica P. John Fund, Inc.</i> , 134 S. Ct. 2398 (2014) .....	6
<i>In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation</i> , 795 F.3d 380 (3d Cir. 2015) .....	7, 8
<i>In re Deepwater Horizon</i> , 739 F.3d 790 (5th Cir. 2014) .....	20
<i>In re Diet Drugs Products Liability Litigation</i> , 282 F.3d 220 (3d Cir. 2002) .....	8
<i>In re Diet Drugs Products Liability Litigation</i> , 369 F.3d 293 (3d Cir. 2004) .....	7, 8
<i>In re Diet Drugs Products Liability Litigation</i> , No. 1203, 99–20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) .....	8
<i>In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation</i> , 55 F.3d 768 (3d Cir. 1995) .....	<i>passim</i>
<i>In re Insurance Brokerage Antitrust Litigation</i> , No. 04-5184, 2007 WL 1652303 (D.N.J. June 5, 2007) .....	19
<i>In re Literary Works in Electronic Databases Copyright Litigation</i> , 654 F.3d 242 (2d Cir. 2011) .....	<i>passim</i>
<i>In re Southwest Airlines Voucher Litigation</i> , — F.3d —, 2015 WL 4939676 (7th Cir. Aug. 20, 2015) .....	11

<i>Juris v. Inamed Corp.</i> , 685 F.3d 1294 (11th Cir. 2012).....	8
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999) .....	6, 22
<i>Redman v. RadioShack Corp.</i> , 768 F.3d 622 (7th Cir. 2014).....	4, 18, 20
<i>Tennille v. Western Union Co.</i> , No. 09-cv-00938, 2014 WL 5394624 (D. Colo. Oct. 15, 2014) .....	19
<i>Wal-Mart, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011) .....	6, 7, 8

## Rules

Federal Rule of Civil Procedure 23(a) .....	6
Federal Rule of Civil Procedure 23(a)(4).....	11
Federal Rule of Civil Procedure 23(h)(1) .....	20

## Miscellaneous

<i>Newberg on Class Actions</i> § 8.24 (5th ed.) .....	20
--	----



## INTRODUCTION

These appeals present the most difficult problem in the law of class actions: When may a global settlement release both present- and future-injury claims? Because of the fundamental divergence of interests between these two groups, courts must ensure that the deal was not achieved at the expense of future claimants—meaning, at a minimum, that those claimants had a truly independent, uncompromised voice at the negotiating table.

But throughout their nearly 200 pages of briefing, the settling parties act as if the two most relevant precedents on this problem—*Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)—do not exist. They do so at their peril. *Amchem*’s core requirement of “fair and adequate representation for the diverse groups,” *id.* at 627, may not be satisfied with empty gestures, or limited to its “unique facts.” CC Br. 60. The same goes for Judge Becker’s landmark opinion in *Georgine*, which zeroes in on the conflict of interest that infects this settlement: “presently injured class representatives cannot adequately represent the futures plaintiffs’ interests and vice versa.” 83 F.3d at 631.

The parties’ failure goes well beyond their refusal to engage with precedent. They also steadfastly refuse to answer the “basic questions” that courts “ask to detect those cases settled” without adequately “protect[ing] the interests of the absentees.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d

768, 806 (3d Cir. 1995) (“*GM Trucks*”). It is these questions—not the *Girsh* factors—that expose inadequate representation. We asked them in our opening brief (at 30–31) and do so again:

- **Do the settlement terms reveal a “disparity between the currently injured and [future-injury] categories,” *Amchem*, 521 U.S. at 626, such that the settlement “trad[es] the claims of the latter group away in order to enrich the former group,” *GM Trucks*, 55 F.3d at 797?**

The NFL, to its credit, does not deny the disparity at the heart of this deal; it just says that “the line has to be drawn somewhere.” NFL Br. 76. But why was the line drawn at precisely the point at which the present- and future-injury claimants’ interests diverge? The parties offer no good answers. If this were a discrimination case, the parties would be defending a policy of disparate treatment, not disparate impact. And their failure to provide a non-pretextual explanation would be fatal.

- **“Have major causes of action or types of relief sought in the complaint been omitted by the settlement?” *GM Trucks*, 55 F.3d at 806.**

Nobody denies that this litigation has always been about CTE. And yet class counsel—seeking to downplay the disparate treatment—now claim that the settlement “is not designed to compensate CTE.” CC Br. 77. According to class counsel, that is because of the scientific uncertainty surrounding CTE. But scientific uncertainty is a reason to *preserve*, not extinguish, future claims—a central lesson of *Georgine* and *Amchem*. It is precisely because of the “difficulty in forecasting

what their futures hold” that future claimants, if they really had a voice at the table, would have insisted on a deal that “keeps pace with scientific advances,” not one that “freezes [the science] in place.” *Georgine*, 83 F.3d at 631.

- **Were there insufficient “structural protections to assure that differently situated plaintiffs negotiate[d] for their own unique interests,” *Georgine*, 83 F.3d at 631?**

Class counsel contend that the creation of “subclasses” provides the necessary protections. But the parties have made no effort to actually *prove* that the subclass counsel were truly independent. “Far too much turns on the adequacy of representation to accept it on blind faith.” *GM Trucks*, 55 F.3d at 797. It is bad enough that the futures subclass counsel (Arnold Levin) was drawn from, and answerable to, the Plaintiffs’ Steering Committee. (If this were a separation-of-powers case, would he be deemed independent of the committee?) But the problem here is worse. Levin appears to have represented former players who asserted present-injury claims, even as he had a fiduciary obligation to solely represent the interests of players asserting only future claims. And Levin admitted to having a one-third contingency stake in the recoveries of his current-injury clients. A.667. No matter how you spin it, that is a disabling conflict of interest.

- **“Did the parties achieve the settlement after little or no discovery?” *GM Trucks*, 55 F.3d at 806.**

Class counsel do not dispute that they negotiated a global release of CTE claims without requesting internal NFL documents about the risk of CTE (and that

they did so before any of these claims had been litigated). That is inexcusable. Class counsel’s only justification is an unexplained assertion (at 52) that “[t]his was not a case where privately held information by the parties would ultimately tip the litigation.” But how can they know without seeking discovery?

- **Is the settlement “accompanied by [the likelihood] of an enormous legal fee,” *GM Trucks*, 55 F.3d at 801?**

Despite this lack of discovery, the settlement entitles class counsel to seek \$112.5 million, a set-aside worth 5% of each class member’s recovery, and additional (unknown) contingency fees (likely 33%). Yet, by withholding their fee motion until after final approval, class counsel have withheld pertinent information—such as whether Mr. Levin had a financial interest in current claimants’ recoveries—that should have been disclosed in the motion. Class counsel have provided no reason why this Court should “permit[] so irregular, indeed unlawful, a procedure” in this case. *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). That is because there is none. In this Circuit, “a thorough judicial review of fee applications is required in all class action settlements.” *GM Trucks*, 55 F.3d at 819–20. Because that did not happen here, the settlement must be reversed for that reason as well.

## ARGUMENT

### **I. Because class counsel have not affirmatively demonstrated that the settlement’s terms and negotiation structure establish adequate representation, reversal is required.**

The central question in these appeals is whether class counsel provided the necessary “structural assurance of fair and adequate representation.” *Amchem*, 521 U.S. at 627. Answering that question entails “a substantive inquiry into the terms of the settlement,” as well as “a procedural inquiry into the negotiation process.” *GM Trucks*, 55 F.3d at 785. Only by “hom[ing] in” on both substance and procedure, as Judge Becker did in *Georgine* and *GM Trucks*, may this Court assure itself that future claimants’ interests were really represented. *Amchem*, 521 U.S. at 619; *see id.* at 627.

Ignoring that approach, the settling parties divorce substance and procedure. They refuse to acknowledge that the settlement’s core substantive problem—its disparate treatment of present and future claimants—matters to adequacy because it is “evidence of prejudice to the interests of a subset of plaintiffs.” *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011). And the parties refuse to provide evidence showing that the negotiation process that created this disparity protected future claimants by ensuring that they had an uncompromised, independent lawyer to vigorously advocate for their interests—interests that are at odds with those of current claimants.

That is fatal to the settlement. Because “Rule 23 does not set forth a mere pleading standard,” class counsel must “affirmatively demonstrate” that the settlement class complies with the rule. *Wal-Mart, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). They have not done so. They have not shown, through the structure of the negotiations and terms of the settlement, that there was “*in fact* . . . adequacy of representation, as required by Rule 23(a).” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

**A.** Take the structure first. Class counsel offer only one reason why they believe there were sufficient “structural protections” to ensure that current and future claimants “negotiate[d] for their own unique interests.” *Georgine*, 83 F.3d at 631. They contend (at 35) that the “structural concerns” identified in *Georgine* and *Amchem* are “directly addressed” by the fact that class counsel created separate “subclasses” during the negotiation process and proposed “a separate representative and counsel” for each group.

But class counsel make no attempt to “actually *prove*” that each subclass was in fact adequately represented, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014)—that is, that each subclass actually had independent, “separate representation to eliminate conflicting interests of counsel,” as Rule 23 requires, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). Nor did class counsel make this showing below. *See* Dkt. No. 6423-1, at 24–26; No. 6467, at 29–31. And the district

court likewise failed to provide *any* analysis to support its statement (at A.93) that “[e]ach Subclass has its own independent counsel”—much less the “rigorous analysis” required by *Wal-Mart*, 131 S. Ct. at 2551.<sup>1</sup>

These dual failures—class counsel’s failure to carry their burden of proving adequacy, and the court’s failure to rigorously assess the independence of subclass counsel—are reversible errors under binding precedent from this Court and the Supreme Court. “Far too much turns on the adequacy of representation to accept it on blind faith.” *GM Trucks*, 55 F.3d at 797. That is especially true in a class settlement like this one, seeking to bind people “who may not develop compensable injuries for years to come, if ever.” A.1117. In this context, Rule 23’s requirements demand “heightened” attention, not dilution. *Amchem*, 521 U.S. at 620.

Class counsel cannot make up for these shortcomings on appeal, and do not even try to do so.<sup>2</sup> Our opening brief (at 42–43) posed several questions to help

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<sup>1</sup> Although class counsel (at 64 n.21) try to characterize the district court’s statement of subclass counsel’s independence as a “finding[]” supported by “record evidence,” whether class counsel have established adequacy is a *legal* question. And the only “record evidence” class counsel identify are two declarations by the mediator that do not in any way show subclass counsel’s independence. In any event, “the participation of [an] impartial mediator” cannot “compensate for the absence of independent representation.” *In re Literary Works*, 654 F.3d at 253.

<sup>2</sup> Instead, class counsel accuse the objectors (at 59–62) of “violat[ing] [their] ethical obligations” by failing to discuss what class counsel call “this Court’s two most relevant decisions” on adequacy: *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380 (3d Cir. 2015), and *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293 (3d Cir. 2004). But *Community Bank* reaffirms that “fundamental” intra-class conflicts (like the one here) are “serious enough to require separate counsel for

determine whether counsel for the “futures” subclass, Arnold Levin, was actually independent during negotiations. Class counsel offer no response. Far from “affirmative[ly] demonstrat[ing]” that Mr. Levin was unconflicted throughout negotiations, *Wal-Mart*, 131 S. Ct. at 2550, class counsel are unwilling even to *represent* to this Court that he was unconflicted.

Given this record, it is not hard to see why. When Levin was selected by class counsel to represent all future-injury plaintiffs, he had a fiduciary obligation “to represent solely” those plaintiffs. *Georgine*, 83 F.3d at 631; *see also Juris v. Inamed Corp.*, 685 F.3d 1294, 1323 (11th Cir. 2012). Just as “presently injured class representatives cannot adequately represent the futures plaintiffs’ interests and vice versa,” *Georgine*, 83 F.3d at 631, a lawyer cannot adequately represent plaintiffs in both of these “mutually exclusive camps,” *In re Literary Works*, 654 F.3d at 251.

Yet that appears to be exactly what Levin did. The record shows that he represents class members who have asserted present claims based on present

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each subclass.” 795 F.3d at 393–94. And *Diet Dugs* is neither “squarely on point” nor “controlling.” CC Br. 37. The decision class counsel cite addresses the Anti-Injunction Act, *Younger* abstention, and the settlement’s punitive damages provision. 369 F.3d at 303–05. It does not mention Rule 23. To the extent class counsel meant to cite the district court’s earlier unpublished decision, that too is off-point. *In re Diet Drugs*, No. 1203, 99–20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000). The district court explained that there was no “futures” problem there, and class members whose existing injuries might progress over time were afforded substantial “structural protections,” including “meaningful” back-end opt-out rights. *Id.* at \*46, \*49; *see also In re Diet Drugs*, 282 F.3d 220, 231 (3d Cir. 2002) (upholding district court’s findings that “there were no trade-offs between the classes” and “no conflict between those seeking future benefits and those seeking them immediately”).



injuries. He is counsel of record in two cases brought by nine plaintiffs, and his law partner is counsel of record in a third case brought by eleven plaintiffs. A.667. For the Court's convenience, we are providing copies of the complaints in these cases, all of which were consolidated in this case, along with a motion for judicial notice. *See* Mot. for Judicial Notice, Exs. A–C; *see also* Dkt. No. 2480 (Shoals short-form complaint), 2484 (Heneseey short-form complaint). Mr. Levin's clients in these cases alleged a variety of present neurocognitive injuries, "including but not limited to Dysphasia, problems with retrieving words and organizing speech, difficulty with mental organization, memory dysfunction," and other "cognitive problems." *See, e.g.,* Mot. for Judicial Notice, Ex. C, at 21-26. And Levin disclosed in his application for appointment to the Plaintiffs' Steering Committee that he "has agreed to fees in these cases on a 1/3 contingency fee." A.667.

We do not know for sure whether Levin continues to represent these clients, or whether he retains a financial interest in their cases, because class counsel have refused to file their fee petition (an independent ground for reversal, as discussed in Part II). But Levin has not notified the district court that he has withdrawn from his representation of these individuals, at least not to our knowledge, nor has he relinquished his financial stake in their recoveries. And even if he had done so, class counsel have not produced any evidence showing that he obtained the necessary informed consent from each individual to undertake an adverse representation.

Absent such evidence, this conflict disqualifies Mr. Levin under *Georgine*. A lawyer cannot simultaneously represent people with current injuries, asserting current claims, while purporting to represent a class of people with no current injuries, asserting only future claims.<sup>3</sup>

The depth of this conflict is illustrated by the fact that subclass counsel for the current-injury plaintiffs, Dianne Nast, also represents a client (class member Andrew Glover) who alleged the same injuries as Levin’s clients—and in fact *was* one of Levin’s clients, and may still be one of his clients. *See* Mot. for Judicial Notice, Ex. A, at 21–22 (complaint filed by Levin alleging that Glover and other plaintiffs have “suffered memory loss and headaches”); Ex. D, at 4 (complaint filed by Nast alleging that “Glover suffers from memory loss, depressions, motor skill impairment, and sleep loss”); *see also* Dkt. No. 587 (Glover short-form complaint). Although Glover voluntarily dismissed his claim in the action brought by Levin, class counsel have provided no evidence showing that Levin has extinguished his attorney-client relationship and fee agreement with Glover, let alone evidence that Glover provided informed consent sufficient to allow Levin to represent class members with adverse interests. *See In re Sw. Airlines Voucher Litig.*, — F.3d —, 2015 WL

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<sup>3</sup> To the extent that Levin might later seek to disavow his financial stake in the claims of currently injured plaintiffs, or that he disavowed his stake at some point after the negotiations were complete, that disavowal cannot cure a conflict that existed when the substance of the deal was being negotiated.

4939676, \*12–13 (7th Cir. Aug. 20, 2015).<sup>4</sup> Quite the contrary: By taking the extraordinary step of withholding their fee petition until after the settlement is approved and appeals are exhausted, class counsel have thwarted this Court’s ability to review evidence bearing on potential conflicts in determining adequacy.

Even if class counsel could prove that Levin and Nast were unconflicted during the negotiation process, class counsel still could not establish adequacy under Rule 23(a)(4). That is true for at least three reasons. *First*, as we explained in our opening brief (at 40–42), there is no evidence showing that Levin was actually independent from the Plaintiffs’ Steering Committee of which he was a part. Because he was handpicked by class counsel without court oversight, there is no reason to think that he could not have also been removed by class counsel during the negotiation process if he were to threaten the deal by insisting on any of the protections that a rational future claimant would want: (1) equal compensation for

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<sup>4</sup> It is theoretically possible, of course, that Levin withdrew from his representation, disclaimed his financial interest, and obtained informed consent at the very moment he was selected to represent future-injury plaintiffs. It is also theoretically possible that none of his clients currently have qualifying diagnoses, even though they have asserted present claims. But class counsel has not even attempted to establish that this is so, and it seems particularly unlikely here: If the interests of Levin’s clients were actually aligned with the interests of future-injury class members (rather than currently injured members), why didn’t he select one of *those* clients to serve as subclass representative after Corey Swinson died, instead of conducting a month-long search to find a replacement? And how, in any event, could Ms. Nast—who had a fiduciary obligation to represent *only* current claimants—also represent Glover if he had not obtained a qualifying diagnosis by the time Nast was selected as “subclass” counsel?

CTE, rather than “no monetary award at all,” *Georgine*, 83 F.3d at 630; (2) a deal that “keep[s] pace with changing science and medicine, rather than freezing in place the science,” *id.* at 631; and (3) “sturdy back-end opt-out rights,” rather than binding future claimants before they have the necessary information to make an informed decision. *Amchem*, 521 U.S. at 610.

*Second*, the sole class representative for the future-injury subclass, Shawn Wooden, played no part in the negotiations and came in only after it was clear that he would support the deal as it stood. A.3824, 3902. Like Levin, Wooden did not insist on future CTE compensation or a deal that takes account of future scientific developments, nor did he insist on back-end opt-out rights. To the contrary, Wooden expressly omitted his CTE-related future claims—a clear sign of inadequacy. *See* Opening Br. 43–44. Class counsel’s only response (at 64) is to hide behind the district court’s determination (which they characterize as a “finding[]”) that Wooden adequately raised an implicit CTE claim, even though he did not mention CTE by name and did not seek compensation for it. But that does not undermine our point; it is an indicator of inadequacy.<sup>5</sup>

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<sup>5</sup> Class counsel also mischaracterizes our argument (at 63–70) as a “demand for a subclass for CTE,” akin to “requir[ing] dozens (and perhaps hundreds) of subclasses.” Nonsense. Although *amicus curiae* Public Citizen has sensibly called for an approach that would eliminate potential intra-class allocative conflicts by requiring a modest number of subclasses to represent people with different diseases, *see also In re Literary Works*, 654 F.3d at 249–57, that is not our argument. Our argument is that Wooden’s failure to seek compensation for future CTE—while

Finally, if more confirmation of inadequacy were needed, a declaration submitted by co-lead counsel Christopher Seeger makes clear that class counsel did not “designate[]” Levin and Nast as subclass counsel until “*after* [a negotiation] structure was agreed to” that defined each “qualifying injury”—including the exclusion of future CTE claims and recovery for mood and behavioral symptoms associated with CTE. A.3578 (emphasis added).<sup>6</sup> In other words, class counsel did not create the proposed “subclasses” until after the key substantive disparity between current and future claimants had already been negotiated by conflicted class counsel. This only confirms what was already clear: The creation of separate “subclasses” was a device to circumvent *Georgine* and *Amchem*, not a meaningful attempt to comply with them.

**B.** These “structural flaw[s]” would preclude a finding of adequacy here “[e]ven in the absence of any evidence that the Settlement disfavors [future-injury]-only plaintiffs.” *In re Literary Works*, 654 F.3d at 253. But there is no absence of evidence. “[T]he Settlement itself contains terms that illustrate a lack of adequate representation of [future-injury]-only plaintiffs.” *Id.*

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waiving all future claims for CTE—further demonstrates the inadequacy of representation of future-injury plaintiffs that lies at the heart of this appeal.

<sup>6</sup> Perhaps this is not surprising. Were it otherwise, Levin and Nast would have been subclass counsel *before* the proposed subclass definitions had even been established, meaning that they could not have known whose precise interests they were purporting to represent during negotiations, and thus could not have adequately represented those interests and guarded against a potential conflict.

The most “conspicuous evidence” of inadequacy is the settlement’s disparate treatment of CTE—the disease that prompted this litigation in the first place. *GM Trucks*, 55 F.3d at 797. Under the settlement’s terms, if a class member died with CTE *before* April 22, 2015, his estate will receive up to \$4 million. But if a class member dies *after* April 22, 2015, his estate will “get no monetary award at all.” *Georgine*, 83 F.3d at 630. And the settlement forces future claimants to release all “claims relating to CTE,” A.77—a release that the NFL says (at 76) is “a critical component of any settlement” because of the tremendous value of those claims.

What justifies this disparity? The NFL’s answer (at 75) is the “comprehensive benefits of the settlement agreement, including the [Baseline Assessment Program]” and the potential future compensation for other qualifying diagnoses, such as dementia. But baseline testing and the possibility of a smaller award in the future are not substitutes for millions of dollars in CTE compensation. If they were, the NFL would not have refused to pay future CTE claims.

Although the NFL hypothesizes (at 69) that “the financial benefits provided by the settlement may,” in some rare instances, “prove more substantial than those provided for Death with CTE,” the one example the NFL gives shows otherwise. It identifies one class member whose spouse (former Pittsburgh Steelers lineman Ralph Wenzel) was “allegedly diagnosed with early dementia 13 years prior” to his death at age 69 in 2012, at which point he was diagnosed with CTE. NFL Br. 69.

Because of his CTE diagnosis, the NFL says he is eligible to receive up to \$828,000 in compensation. But if he had died *without* a CTE diagnosis, he might not be eligible to receive any award. And if he had died with CTE *after* final approval, or if he were still living, he would be eligible to receive an award of at most \$210,000 (roughly one quarter of the value of his CTE claim). A.5741. In other words, it is his current CTE claim that is responsible for the increased award—nothing else.

Unable to justify the disparity, the NFL candidly admits (at 76) that “the line has to be drawn somewhere and a logical place to draw a line” is to “distinguish[] between prospective and retrospective benefits.” That is precisely our point. Drawing a line at the “most salient conflict” in this case—providing a lucrative benefit to current claimants, but not future claimants—does not somehow demonstrate adequacy; it confirms *inadequacy*. *Georgine*, 83 F.3d at 630.

Class counsel’s attempts fare no better. After asserting that the settlement’s “omission” of future CTE claims was “deliberate,” counsel explain how they “fought hard in the negotiations to make sure that [those class members with current CTE claims] would be compensated.” CC Br. 77, 85. And indeed they did. That is why current CTE claimants can receive up to \$4 million in compensation. The problem, however, is that counsel did not fight equally hard to obtain *any* compensation for future CTE claims, despite their value.

Class counsel provide no justification for this disparity beyond what the district court said in its opinion: that compensating current CTE claims is not the result of an intra-class conflict, but is intended only to serve as a proxy for compensating qualifying diagnoses that class members could not have obtained while living. *See id.* at 77–80, 84–86. Our opening brief (at 32–36) explains the many flaws in that justification, and class counsel have no response. They seize on the same example given by the NFL, *see id.* at 85–86, but ignore the fact that the settlement treats Wenzel differently because he was diagnosed with CTE and died before final approval. Had that not been the case, his compensation would be far less (and perhaps nothing). The additional amount he receives is not a “proxy” for anything—it is compensation for CTE.

The settlement’s facial discrimination against future claimants with respect to CTE is not the only substantive indicator that those claimants were inadequately represented. The settlement also fails to include any assurance that the deal will “keep pace with changing science and medicine,” including developments in the scientific understanding of CTE, as future claimants would naturally “desire.” *Georgine*, 83 F.3d at 631. Class counsel claim that they did seek such assurance because “that can hardly be a meaningful position for the more than 5,200 players who filed suit in the here and now.” CC Br. 47. “Reality,” they say, “dictates that



the science be viewed as it stands today.” *Id.* at 83. But the only “reality” that dictates that result is the intra-class conflict identified in *Georgine* and *Amchem*.

Class counsel ask this Court to overlook that conflict because absent class members had the right to opt out of the class. *Id.* But class members can *always* opt out of a class before final approval. If that were enough to overcome inadequacy, *Georgine* and *Amchem* would have been decided differently. The same is true of class counsel’s related argument that class members’ “silence” signals “overwhelming support” for this deal. CC Br. 42, 98. As Judge Becker explained, future-injury class members often “lack adequate information to properly evaluate whether to opt out of the settlement” because of “the difficulty in forecasting what their futures hold.” *Georgine*, 83 F.3d at 633. That difficulty is compounded in this case because of the difficulty of predicting how the CTE science will evolve and whether further evidence (like the kind that might have been obtained had there been discovery) will strengthen the link between brain injuries and pro football.

That is why future-injury class members—given the potential value of their claims and their “substantial stake in making individual decisions on whether and when to settle”—“would also seek sturdy back-end opt-out rights.” *Amchem*, 521 U.S. at 610, 616. But that too did not happen here—yet another substantive indicator of inadequacy. Class counsel do not say why they did not seek back-end opt-out rights, but this Court has already provided the answer: because current

claimants' interests (to say nothing of the lawyers' interests) "are against such an opt out as the more people locked into the settlement, the more likely it is to survive."

*Georgine*, 83 F.3d at 631.

**II. The settlement's unlawful fee-deferral procedure deprives this Court of a critical tool for assessing the adequacy of class counsel's representation of the future-injury claimants, independently warranting reversal.**

Our opening brief (at 46–54) raised an independent ground for reversal: this settlement's unusual fee-deferral procedure, under which class counsel have refused to file a fee motion until *after* final approval (and, presumably, until after this Court rules). As our opening brief explained (at 54), counsel are obliged to disclose in their fee motion all terms and understandings underlying the fee arrangements, including any "side agreements" between counsel and class members. Deferring submission of the fee motion thus deprives class members and the Court of information essential to a thorough evaluation of the settlement. Yet class counsel offer "no excuse for permitting so irregular, indeed unlawful, a procedure," *Redman*, 768 F.3d at 638, let alone any authority to support it.

Despite the lack of discovery or litigation beyond a motion to dismiss, the settlement entitles class counsel to seek up to \$112.5 million in uncontested attorneys' fees—the equivalent of roughly 187,500 hours (or 21.4 years) of time—plus a set-aside worth up to 5% of the benefits paid to each class member, A.5671, plus additional unknown, substantial contingency-fee payments, A.1553. Yet the

deferral procedure hides basic information that goes to the heart of counsel's adequacy, and thus the settlement's fairness, including:

- Do the fee arrangements indicate that class or futures subclass counsel will seek fees for previously representing present-injury claimants?
- To what extent does *futures* subclass counsel's entitlement to contingency fee payments for representing *present* claimants constitute a conflict of interest?
- How much will futures subclass counsel receive in total fees and on what basis?
- How much will class counsel receive in side contingency fees?
- How much time did class counsel spend investigating and litigating the case?
- How will the 5% set-aside for "facilitating the settlement program and Class Counsel's efforts in connection with it" be spent? CC Br. 93.

Class counsel give no good reason why this Court should approve the proposed settlement with these questions unanswered—all as a direct result of the fee-deferral procedure. Not only is that procedure unjustified and unexplained; it also lacks legal support. Stating in a footnote that "[n]umerous courts have bifurcated final approval and adjudicated of fees," class counsel cite just three district court decisions. CC Br. 94 n.30. But in two of those cases, the fee motion was filed *before* final approval of the settlement, thus permitting the court to assess the proposed settlement and the fee application together. *See Tennille v. W. Union Co.*, No. 09-cv-00938, 2014 WL 5394624, at \*1 (D. Colo. Oct. 15, 2014); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184, 2007 WL 1652303, at \*2 (D.N.J. June 5, 2007).

And in the third—class counsel’s lone example of anything resembling what occurred here—Judge Barbier appears to have approved a similarly unusual procedure in the BP oil spill litigation, but that procedure went unchallenged in (and was not passed on by) the Fifth Circuit. *See In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014).<sup>7</sup>

Conversely, the Seventh Circuit has held that “fil[ing] the attorneys’ fee motion . . . after the deadline set by the court for objections to the settlement had expired” is “unlawful.” *Redman*, 768 F.3d at 637–38. Were a court to excuse such a delay, Judge Posner explained, it would “handicap” objectors to the settlement “because the details of class counsel’s hours and expenses” would only be “submitted later,” depriving objectors of “all the information they needed to justify their objections.” *Id.* Counsel describe our reliance on *Redman* as “bizarre” and “frivolous,” CC Br. 94 n.31, but cannot articulate (aside from irrelevant factual distinctions) why this Court should reject *Redman*’s reasoning and create a direct conflict with the Seventh Circuit.

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<sup>7</sup> Citing the advisory committee’s note, class counsel suggest that Rule 23(h) reflects no preference for simultaneous adjudication of the fee motion and settlement. But class counsel ignore other language in the same note that stresses the importance of “requir[ing] the filing of at least the initial [fee] motion in time” for the class to evaluate that information as part of the proposed settlement. Fed. R. Civ. P. 23(h)(1), 2003 advisory committee note; *see also Newberg on Class Actions* § 8.24 (5th ed.) (noting that Rule 23 envisions “linking together settlement notice and objections with fee notices and objections”).

Rather than attempt to justify the unusual procedure here, class counsel evade the issue. Counsel assure this Court that class members will “be afforded an opportunity to object” the *fee request* “in due course.” *Id.* at 94. But that misses the point. Counsel do not deny that, as a result of the deferral, class members will be deprived of the opportunity to object to the *settlement* based on information that would be revealed in a fee motion. And although class counsel argues that “any ultimate fee award does not lessen the class recovery,” *id.* at 95, that cannot justify refusing to file a motion until after approval; in *GM Trucks*, this Court reversed the district court’s “initial refusal to review” a fee motion based on this same rationale. 55 F.3d at 819–20. Counsel, however, say not a word about that precedent.<sup>8</sup>

Nor do class counsel deny that the fees are effectively insulated from judicial review, violating this Circuit’s command in *GM Trucks* that “a thorough judicial review of fee applications is required in *all* class action settlements.” *Id.* (emphasis added). If the settlement is approved, class members will no longer have any

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<sup>8</sup> Class counsel’s assertion that “there was no discussion of fees until after the parties had agreed to the merits of the settlement,” CC Br. 92, is not only legally irrelevant under *GM Trucks*, but also factually inaccurate. To be sure, the total cap on class benefits (later eliminated by the district court) was fixed at the time the term sheet was announced, after which class counsel commenced fee negotiations. A.88, A.956. But the parties’ negotiation over the *amount* of the benefits for each qualifying injury—and thus the amount the NFL would ultimately have to pay to the class—continued for the next four months, a period during which class counsel’s fee negotiations also took place. A.3586–87 (explaining that both the fees and the “monetary award grid” were negotiated after the term sheet was signed and made public on August 29, 2013).

incentive to challenge the fee petition because it could not affect their recoveries. The settling parties could also argue that class members lack standing to appeal, *see* Armstrong Br. 51, an issue counsel leave unaddressed. Moreover, the settlement agreement’s “clear-sailing” clause—which “weigh[s] substantially against the fairness of a settlement” and calls for “intense critical scrutiny,” *id.* at 50—bars the NFL from ever challenging class counsel’s fees.

Finally, counsel do not deny that the settlement permits the enforcement of contingency fees arising out of retainer agreements with class members. A.1553. This compensation source represents a significant conflict of interest because it creates an incentive to maximize recoveries for present claimants (with whom class counsel had existing agreements) at the expense of future claimants’ recoveries. As noted, the futures subclass counsel himself, Arnold Levin, had such a contingency-fee arrangement with several individual class members, A.667, the details of which would further highlight the fact that Levin’s interest in obtaining greater recovery for his clients compromised his purported independence as subclass counsel. *See Ortiz*, 527 U.S. at 852–53. Of course, without a fee motion, we cannot know the details. Because class counsel’s failure to file the motion prevents a complete inquiry into whether future-injury claimants were adequately represented, the district court’s final approval should be reversed.

## CONCLUSION

The district court's approval of the settlement should be reversed.

Respectfully submitted,

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## COMBINED CERTIFICATIONS

**1. BAR MEMBERSHIP:** I certify that I am a member of this Court's bar.

**2. WORD COUNT, TYPEFACE, AND TYPE STYLE.** I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure of 32(a)(7)(B) because the brief (as indicated by my word processing program, Microsoft Word) contains 5,834 words, excluding those portions excluded under Rule 32(a)(7)(B)(iii). I also certify that this brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type style requirements because this brief has been prepared in the proportionally spaced typeface of 14-point Baskerville.

**3. SERVICE:** I certify that on October 7, 2015, I am causing this brief to be filed electronically with this Court's CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

**4. PAPER COPIES:** I certify that the text of the electronic version of this brief is identical to the text in the paper copies that will be delivered to the Court.

**5. VIRUS CHECK:** I certify that I have performed a virus check using Sophos antivirus, and that no virus was detected.

October 7, 2015

/s/ Deepak Gupta  
Deepak Gupta



# Exhibit EE

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 15-2272 and 15-2294

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IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY LITIGATION

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania

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**OPPOSITION OF CLASS PLAINTIFFS-APPELLEES  
TO ARMSTRONG APPELLANTS'  
MOTION FOR JUDICIAL NOTICE**

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Class Plaintiffs-Appellees ("Plaintiffs") respectfully submit this Opposition to the Armstrong Appellants' Motion for Judicial Notice, filed in Appeals Nos. 15-2272 and 15-2294 ("Motion"). Counsel for the NFL Parties-Appellees have authorized the undersigned to represent that they concur that the Motion should be denied.

The Armstrong Appellants make no argument that the multiple complaints they seek to lodge with this Court have not been long available. They do not claim that they were prevented in any way from

presenting them to the district court; that the district court was unaware of the information (despite its role in overseeing the MDL); or that the information would have impacted the outcome had the court addressed it in its decision. Instead, they seek to make a specific argument about a specific claimed conflict for the first time on appeal – and not only on appeal, but as part of a *reply brief*.<sup>1</sup>

The Armstrong Appellants knew that if they held back this particular argument until the reply stage on appeal, Plaintiffs would not have an opportunity to oppose this new argument in writing. Their attempt to deprive not only the appellees, but also the district court, of the opportunity to address this particular argument relating to the adequacy of counsel for Subclass 1 – by asking this Court in the first instance to take “judicial notice” of complaints that have been on file below for years – should not be countenanced.

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<sup>1</sup> In their reply brief, the Armstrong Appellants contend that they addressed the issue of Mr. Levin’s adequacy in their opening brief at pages 42-43. *See* Armstrong Reply Brief [Doc. No. 003112095595] at 7-8. The thrust of the few sentences in their opening brief allegedly addressing this issue were actually directed at attorneys’ fees, an issue which the district court has yet to address. *See* Armstrong Opening Brief [Doc. No. 003112073560], at 42-43. In contrast, the Armstrong Appellants spend seven pages, a third of their reply brief, attacking Mr. Levin’s adequacy to serve as subclass counsel. *See* Armstrong Reply Brief at 6-13.

Of paramount concern, however, is not the prejudice to the parties of raising an issue for the first time in a reply brief on appeal. Rather, of necessity, appellate courts sit in review of actions taken by a district court. The issue on appeal is always whether the court below erred. This, in turn, requires that a reviewing appellate court examine the record as it stood before the district court, not as it has been reshaped on appeal by some clever lawyering. Thus, “[j]udicial notice may be taken at any stage of proceeding ... including appeal ... *as long as it is not unfair to a party to do so and does not undermine the trial court’s factfinding authority.*” *In re Indian Palms Assocs.*, 61 F.3d 197, 205 (3d Cir. 1995) (internal quotations and citations omitted; emphasis added). Put simply, the district court did not abuse its discretion by not considering arguments that were available to the Armstrong Appellants in the proceedings below, but never raised. “The Court of Appeals exists to correct errors made by the district courts, and it makes no sense for an appellant to assert that the district court erred when it had no opportunity to even address a particular issue.” *Venuto v. Carella*,

*Byrne, Bain, Gilfillin, Cecchi & Stewart, P.C.*, 11 F.3d 385, 393 (3d Cir. 1993) (Nygaard, J., concurring).<sup>2</sup>

The combination of failing to raise arguments below and then raising such arguments for the first time in a reply brief violates well-settled law of this Court. The “tactic of reserving new arguments for [a] reply brief amounts to impermissible ‘sandbagging.’” *Rockwell Techs., LLC v. Spectra-Physics Laser, Inc.*, No. 00-589 GMS, 2002 WL 531555, at \*3 (D. Del. Mar. 26, 2002) (citing *Jordan v. Bellinger*, 2000 U.S. Dist. LEXIS 19233, at \*18 (D. Del. Apr. 28, 2000)). By waiting until the reply brief, the Armstrong Appellants have deprived appellees, both Plaintiffs and the NFL Parties, from addressing and responding to these arguments and the use of the complaints to bolster them.

Furthermore, the Third Circuit Practice Guide provides: “As the name implies, a reply brief should respond to the arguments in the appellee’s brief. New arguments are not permitted, nor should a reply

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<sup>2</sup> As Judge Ambro pointed out in his dissent from this Court’s rationale for denying the Fed. R. Civ. P. 23(f) petition in *In re NFL Players’ Concussion Injury Litig.*, 775 F.3d 570 (3d Cir. 2014), objectors were creating “inefficient (indeed, chaotic) piecemeal litigation that would interfere with the formal fairness hearing on the settlement.” *Id.* at 589 (Ambro, J., dissenting). This latest tactic similarly fits Judge Ambro’s description.

brief be used simply to restate or elaborate on an argument made in an opening brief.” Bar Ass’n for the Third Fed. Cir., U.S. Court of Appeals for the Third Cir. Practice Guide, at 17 (2012). Waiting until the reply brief stage to submit these complaints that were readily available at the time the opening brief was filed makes a mockery of the appellate process.

This Court has “repeatedly emphasized that failure to raise a theory as an issue on appeal constitutes a waiver because ‘consideration of that theory would vitiate the requirement of the Federal Rules of Appellate Procedure and our own local rules that, absent extraordinary circumstances, briefs must contain statements of all issues presented for appeal, together with supporting arguments and citations.’” *Int’l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, 1327 n.11 (1992) (quoting *Simmons v. Philadelphia*, 947 F.2d 1042, 1065 (3d Cir. 1991)).<sup>3</sup> By raising the theory for the first time on appeal in their reply brief, the Armstrong Appellants have waived the argument. *Id.* (citing *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 205 n.29 (3d Cir.

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<sup>3</sup> This particular argument as to Mr. Levin’s adequacy as counsel for Subclass 1 clearly was not identified in the Armstrong Appellants’ Statement of the Issues. See Armstrong Opening Brief [Doc. No. 003112073560], at 4-5.

1990) (“As a general matter, the courts of appeal will not consider arguments raised on appeal for the first time in a reply brief,”)); *accord Norris v. Brooks*, 794 F.3d 401, 406 (3d Cir. 2015); *Brenner v. United Bhd. of Carpenters and Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991).

Critically, the Armstrong Appellants offer no explanation as to why these materials and the related argument were not presented to the district court (or, at a minimum, why they were not offered at the time of the filing of their opening brief). It cannot be disputed that these complaints were readily available. They date back to 2011 and 2012 and were filed on the PACER System. The objectors were represented below by dozens of lawyers who knew about these complaints and had easy access to them. The Armstrong Appellants cannot credibly claim that these complaints are “newly discovered,” having been publicly filed in or transferred to this MDL years before final or even preliminary approval. *Cf.* Fed. R. Civ. P. 60(b) (defining “newly discovered evidence” for purposes of granting relief from final judgment as that “with reasonable diligence, could not have been discovered in time to move for a new trial”).

At any rate, the district court was well aware that Mr. Levin represented numerous clients who had already filed individual lawsuits prior to the commencement of settlement negotiations. Indeed, all of the members of the Executive and Steering Committees, who were appointed by the district court when it initially assumed handling of this MDL, represented the vast majority of those Retired NFL Football Players who had cases on file. JA685-90. In light of the over 5,000 individually-represented retired players with cases on file, statistically, some would be Subclass 1 members and some would be Subclass 2 members. Therefore, the district court was aware of and implicitly found no conflict or adequacy problems by virtue of Mr. Levin's individual representation of many class members, who necessarily exhibited a variety of symptoms and conditions. That the district court's 132-page opinion does not specifically discuss this issue among the myriad issues actually raised by the objectors below, is a function of the objectors' failure to raise this particular adequacy issue with the district court and with the precision and evidentiary support that they have suddenly mustered in a reply brief on appeal. It cannot be said that the district court was not mindful of this issue or that it erred in its



finding of adequacy of representation, as to Mr. Levin, or as to any of the other appointed Co-Lead Class Counsel, Subclass Counsel or Class Counsel.<sup>4</sup>

For the foregoing reasons, the Court should deny the Motion and strike the portions of the Armstrong Appellants' Reply Brief addressing the issues discussed herein, particularly, pages 6 through 13, which rely upon the materials at issue.

Dated: October 13, 2015

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<sup>4</sup> To the extent that these arguments relate to the attorneys' fees issue, the district court has not yet even been presented with a petition for fees, let alone ruled on one. As such, the issue of fees is not properly before this Court.

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**CERTIFICATE OF SERVICE**

I, Christopher A. Seeger, hereby certify that on the 13th day of October 2015, I electronically transmitted a true and correct copy of the foregoing document, **OPPOSITION OF CLASS PLAINTIFFS-APPELLEES TO ARMSTRONG APPELLANTS' MOTION FOR JUDICIAL NOTICE**, to the Clerk of the Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all attorneys of record who are ECF registrants.

/s/ Christopher A. Seeger  
Christopher A. Seeger

# Exhibit FF

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**Nos. 15-2206; 15-2217, 15-2230, 15-2234  
15-2272, 15-2273, 15-2294**

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**IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY LITIGATION**

---

**APPELLANTS RAYMOND ARMSTRONG, ET AL  
("ARMSTRONG OBJECTORS")**

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**APPELLANTS' OPPOSITION TO CLASS PLAINTIFFS-APPELLEES'  
MOTION TO EXPEDITE APPEALS**

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Appellants, Raymond Armstrong; Nathaniel Newton, Jr.; Larry Brown; Kenneth Davis; Michael McGruder; Clifton L. Odom; George Teague; Drew Coleman; Dennis DeVaughn; Alvin Harper; Ernest Jones; Michael Kiselak; Jeremy Loyd; Gary Wayne Lewis; Lorenzo Lynch; Hurles Scales, Jr.; Gregory Evans; David Mims; Evan Oglesby; Philip E. Epps; Charles L. Haley, Sr.; Kevin Rey Smith; Darryl Gerard Lewis; Curtis Bernard Wilson; Kelvin Mack Edwards, Sr.; Dwayne Levels; Solomon Page; Tim McKyer; Larry Barnes; James Garth Jax; William B. Duff; Mary Hughes; Barbara Scheer; and Willie T. Taylor; hereby submit this opposition to the Class Plaintiffs' Motion to Consolidate and Expedite Appeals filed on May 26, 2015. Appellants do not oppose the Motion to Consolidate Appeals.

In addition, Appellants object to Class Plaintiffs' suggestion that the parties forego the FRAP 33 mediation process as this is required by the Rules and is a very important process.

Plaintiffs-Appellees did not confer with the Raymond Armstrong Appellants prior to filing their motion. The proposed opening brief due date of July 10, 2015, is not acceptable to

Appellants, as it is only six weeks away and the cases have not been consolidated yet, nor has the record been completed.

Appellants note for the record that Plaintiffs-Appellees have not presented any reasons justifying expediting the briefing in this case. For example, they state that "some appellants are individuals who never filed a case in their individual capacity." The settlement, however, includes them in the same class as the currently injured, and releases their future, unripe claims for no consideration. This is not a valid reason for expediting briefing.

The conflict between the truly injured and those improperly included in the class is entirely of Plaintiffs' own making. Plaintiffs could have limited the class to former players currently suffering from diseases caused by concussions, and negotiated a settlement that made immediate payments to everyone in the class, but class counsel and the NFL chose not to go this route, so these Appellants should not be penalized. The Court should deny the Motion for Expedited Appeal and make all parties follow FRAP 33.

Date: June 1, 2015

Respectfully submitted,

By: /s/ Richard L. Coffman

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was filed via the ECF filing system on June 1, 2015, and that as a result electronic notice of the filing was served upon all attorneys of record.

/s/ Richard L. Coffman

Richard L. Coffman



# Exhibit GG

No. \_\_\_\_\_

**In the Supreme Court of the United States**

RAYMOND ARMSTRONG, et al.,

*Petitioners.*

V.

NATIONAL FOOTBALL LEAGUE and NFL Properties LLC,

*Respondents,*

KEVIN TURNER and SHAWN WOODEN,

on behalf of themselves and all others similarly situated,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit*

# PETITION FOR A WRIT OF CERTIORARI

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### QUESTION PRESENTED

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597, 620 (1997), this Court held that Rule 23’s adequacy-of-representation requirement demands “heightened” rigor for settlement classes, and reversed a “class-action certification [that] sought to achieve global settlement of current and future asbestos-related claims.” Because the settlement’s “essential allocation decisions” favored some claimants over others, class members’ interests were “not aligned,” and the Court could find no assurance—“either in the terms of the settlement or in the structure of the negotiations—that the future claimants were adequately represented.” *Id.* at 626-27.

In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999), the Court again invalidated a global settlement that lacked structural protections “at the precertification stage.” The Court stressed that “the District Court took no steps at the outset” to guard against potential conflicts, “relying instead on its post-hoc findings at the fairness hearing.” *Id.* at 831-32. A class of “present and future claims,” the Court held, “requires division into homogeneous subclasses” with “separate representation to eliminate conflicting interests of counsel.” *Id.* at 856.

The Third Circuit in this case approved a global class-action settlement of claims against the NFL stemming from current and future brain injuries. The deal was negotiated by lawyers representing clients with current injuries, and produced a stark disparity as to the disease that animated this litigation in the first place, Chronic Traumatic Encephalopathy: a pre-settlement diagnosis of CTE is worth up to \$4 million; a post-settlement diagnosis is worth nothing.

The question presented is whether approval of such a settlement is consistent with Rule 23’s adequacy-of-representation requirement and due process.

## PARTIES TO THE PROCEEDINGS

Petitioners Raymond Armstrong, Larry Barnes, Larry Brown, Drew Coleman, Kenneth Davis, Dennis DeVaughn, William B. Duff, Kelvin Mack Edwards, Sr., Phillip E. Epps, Gregory Evans, Charles L. Haley, Sr., Mary Hughes, James Garth Jax, Ernest Jones, Michael Kiselak, Dwayne Levels, Darryl Gerard Lewis, Gary Wayne Lewis, Jeremy Loyd, Lorenzo Lynch, Tim McKyer, David Mims, Clifton L. Odom, Evan Ogelsby, Solomon Page, Hurles Scales, Jr., Barbara Scheer, Kevin Rey Smith, George Teague, and Curtis Bernard Wilson, were objectors in the district court and appellants in 15-2272 below. Petitioner Willie T. Taylor was an objector in the district court and appellant in 15-2294 below.

Respondents National Football League and NFL Properties LLC were defendants in the district court and appellees in the proceedings below. Respondents Kevin Turner and Shawn Wooden were class representatives in the district court, and were plaintiffs-appellees below.

Other objectors in the district court and appellants in the consolidated proceedings below were: Craig Heimburger and Dawn Heimburger (15-2206); Cleo Miller, Judson Flint, Elmer Underwood, Vincent Clark, Sr., Ken Jones, Fred Smerlas, Jim Rourke, Lou Piccone, and James David Wilkins, II (15-2217); Curtis L. Anderson (15-2230); Darren R. Carrington (15-2234); Liyongo Patrise Alexander, Charlie Anderson, Charles E. Arbuckle, Cassandra Bailey (as Representative of the Estate of Johnny Bailey), Ben Bronson, Curtis Ceaser, Jr., Larry Centers, Darrell Colbert, Harry Colon, Christopher Crooms, Jerry W. Davis, Tim Denton, Michael Dumas, Corris Ervin, Doak Field, Baldwin Malcolm Frank, Derrick Frazier, Murray E. Garrett, Clyde P. Glosson, Roderick W. Harris, Wilmer K. Hicks, Jr.,

-iii-

Patrick Jackson, Gary Jones, Ryan McCoy, Jerry James Moses, Jr., Anthony E. Newsom, Rance Olison, John Owens, Robert Pollard, Derrick Pope, Glenell Sanders, Thomas Sanders, Dwight A. Scales, Todd Scott, Frankie Smith, Jermaine Smith, Tyrone Smith, and James A. Young, Sr. (15-2273); Scott Gilchrist, individually and on behalf of the Estate of Carlton Chester “Cookie” Gilchrist (15-2290); Jimmie H. Jones, Ricky Ray, and Jesse Solomon (15-2291); Andrew Stewart (15-2292); Alan Faneca, Roderick “Rock” Cartwright, Jeff Rohrer, and Sean Considine (15-2294); and James Mayberry (15-2305). Alvin Harper, Michael McGruder, and Nathaniel Newton, Jr., were also objectors in the district court and appellants in 15-2272 below, but are not petitioners here.

## TABLE OF CONTENTS

Question presented .....	i
Parties to the proceedings .....	ii
Table of contents .....	iv
Table of authorities .....	vi
Introduction .....	1
Opinions below .....	3
Jurisdiction .....	3
Rule involved .....	3
Statement .....	3
I. Nearly every former NFL player who has been examined has been diagnosed with CTE. ....	3
II. Responding to the connection between CTE and football, retired players sue the NFL in droves. ....	4
III. Shortly after the appointment of a mediator, the parties agree to a global settlement. ....	6
IV. The district court approves the settlement. ....	10
V. The Third Circuit affirms. ....	12
Reasons for granting the petition .....	14
I. The Third Circuit’s crabbed view of this Court’s landmark decisions in <i>Amchem</i> and <i>Ortiz</i> cannot be reconciled with other circuits’ cases. ....	14
II. The Third Circuit’s decision contradicts <i>Amchem</i> and <i>Ortiz</i> and delivers a dangerously flawed blueprint for future class cases. ....	26
Conclusion .....	30

-v-

Appendix A	Opinion of the United States Court of Appeals for the Third Circuit (April 18, 2016) .....	App. 2a
Appendix B	Opinion of the United States District Court for the Eastern District of Pennsylvania (April 22, 2015) .....	App. 60a
Appendix C	Amended Final Order and Judgment by the United States District Court for the Eastern District of Pennsylvania (May 8, 2015).....	App. 213a
Appendix D	Clarification to Amended Final Order and Judgment by the United States District Court for the Eastern District of Pennsylvania (May 11, 2015).....	App. 222a
Appendix E	Order Denying Petition for Rehearing by United States Court of Appeals for the Third Circuit (June 1, 2016).....	App. 224a
Appendix F	Rule Involved: Federal Rule of Civil Procedure 23.....	App. 226a

## TABLE OF AUTHORITIES

## Cases

<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	<i>passim</i>
<i>Central States Southeast &amp; Southwest Areas of Health &amp; Welfare Fund v. Merck–Medco Managed Care, L.L.C.</i> , 504 F.3d 229 (2d Cir. 2007).....	21
<i>Charron v. Wiener</i> , 731 F.3d 241 (2d Cir. 2013).....	22
<i>Georgine v. Amchem Products, Inc.</i> , 83 F.3d 610 (3d Cir. 1996).....	10, 15
<i>In re Asbestos Litigation</i> , 90 F.3d 963 (5th Cir. 1996).....	19
<i>In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation</i> , 55 F.3d 768 (3d Cir. 1995).....	24, 29
<i>In re Insurance Brokerage Antitrust Litigation</i> , 579 F.3d 241 (3d Cir. 2009).....	22
<i>In re Joint Eastern &amp; Southern District Asbestos Litigation</i> , 982 F.2d 721 (2d Cir. 1992).....	21
<i>In re Joint Eastern &amp; Southern Districts Asbestos Litigation</i> , 878 F. Supp. 473 (S.D.N.Y. 1995).....	23
<i>In re Literary Works in Electronic Databases Copyright Litigation</i> , 654 F.3d 242 (2d Cir. 2011).....	20, 21, 22, 24



-vii-

<i>In re Payment Card Interchange Fee &amp; Merchant Discount Antitrust Litigation</i> , 827 F.3d 223 (2d Cir. 2016).....	<i>passim</i>
<i>In re Pet Food Products Liability Litigation</i> , 629 F.3d 333 (3d Cir. 2010).....	22
<i>Juris v. Inamed Corp.</i> , 685 F.3d 1294 (11th Cir. 2012) .....	23
<i>National Super Spuds v. New York Mercantile Exchange</i> , 660 F.2d 9 (2d Cir. 1981).....	29
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	<i>passim</i>
<i>Smith v. Sprint Communications Co.</i> , 387 F.3d 612 (7th Cir. 2004) .....	20
<i>Stephenson v. Dow Chemical Co.</i> , 273 F.3d 249 (2d Cir. 2001).....	23
<i>Sullivan v. DB Investments, Inc.</i> , 667 F.3d 273 (3d Cir. 2011).....	19
<b>Other authorities</b>	
John D. Aldock & Richard M. Wyner, <i>The Use of Settlement Class Actions to Resolve Mass Tort Claims After Amchem</i> , 33 Tort & Ins. L.J. 905 (1998).....	19
John Branch, <i>Ken Stabler, a Magnetic N.F.L. Star, Was Sapped of Spirit by C.T.E.</i> , N.Y. Times, Feb. 3, 2016 .....	8
Mark Fainaru-Wada & Steve Fainaru, <i>League of Denial</i> (2013) .....	3

-viii-

Steve Fainaru & Mark Fainaru-Wada, <i>UCLA study finds signs of CTE in living former NFL players</i> , ESPN, Jan. 22, 2013 .....	4
David Geier, <i>Will football players one day take medicine to prevent brain damage?</i> , The Post and Courier, Aug. 5, 2015 .....	3
Geoffrey C. Hazard, Jr., <i>The Futures Problem</i> , 148 U. Pa. L. Rev. 1901 (2000) .....	14
Richard A. Nagareda, <i>The Law of Class Actions and Other Aggregate Litigation</i> (2009) .....	20

## INTRODUCTION

Class-action settlements can profoundly reshape the legal landscape: A small number of litigants and lawyers write the rules that bind thousands of strangers to the litigation, extinguishing their potentially valuable claims in exchange for global peace. To ensure that absentees' claims are not sacrificed for others' benefit, class settlements require court approval. Under Rule 23, courts must be satisfied that the absentees have been adequately represented by those who purport to speak for them.

Perhaps surprisingly, given the obvious importance of the law governing class-action settlements, this Court has squarely addressed the topic just twice—in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)—and has not done so again in the nearly two decades since. Lacking guidance, the circuits that most often confront the issue have adopted conflicting interpretations of these two pathmarking decisions. In one camp is the Second Circuit, which has consistently invalidated settlements and required subclasses with “separate counsel” whenever the deal “impacts the ‘essential allocation decisions’ of plaintiffs’ compensation and defendants’ liability.” *In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 827 F.3d 223, 233-34 (2d Cir. 2016). Even in a collateral attack—a case brought by absentees *after* a settlement’s approval—the Second Circuit has held that the absentees are not “bound by the settlement release” if “their class representative negotiated a settlement and release that extinguished their claims without affording them any recovery.” *Id.* at 237. To hold otherwise would “violate[] due process.” *Id.*

Yet the Third Circuit below held just the opposite. It approved a global class-action settlement in a case that began much like *Amchem* and *Ortiz*: as thousands of

-2-

personal-injury cases filed against the National Football League by former players in the wake of the discovery of Chronic Traumatic Encephalopathy, or CTE, in 2009. Although as of today, this neurodegenerative disease can be definitively diagnosed only in the deceased, that will likely change in the near future. Seeking to head off a tsunami of future claims, the NFL pushed for a global settlement of all current and future CTE claims—while compensating only *current* CTE claims. Under the settlement, the family of a player who dies with CTE before final approval gets up to \$4 million. But an identically situated player who dies after final approval releases his claim and gets nothing—for the exact same diagnosis.

The Third Circuit held that this lopsided settlement satisfies *Amchem* and *Ortiz* and that any intra-class conflict was remedied because, after the architecture of a deal had begun to take shape, the plaintiffs’ lawyers (without going to the district court) designated two of their own members to serve as “independent” counsel for two putative “subclasses”: one for all players who currently have a “qualifying diagnosis” (as defined by the settlement), and one for all players who do not.

If this Court does not intervene now, the consequences will be severe: not only will lawyers and litigants be handed a blueprint for circumventing *Amchem* and *Ortiz*, but thousands of former football players later diagnosed with CTE may file suit in the Second Circuit—and that circuit’s precedent will permit them to collaterally attack the settlement on the ground that it did not provide them any compensation. This is thus the rare case in which a split in the circuits may lead to a different result in the *same litigation*—litigation affecting the lives of thousands of people, hundreds of millions of dollars, and the future of professional football. This Court’s intervention is required.

-3-

**OPINIONS BELOW**

The Third Circuit's opinion is reported at 821 F.3d 410 and is reproduced in the appendix at App. 2a–59a. The district court's opinion is reported at 307 F.R.D. 351 and is reproduced in the appendix at App. 60a–212a.

**JURISDICTION**

The Third Circuit entered judgment on April 18, 2016 (App. 2a) and denied a timely petition for rehearing en banc on June 1, 2016 (App. 224a). Justice Alito granted an order extending the time to file this petition until September 26, 2016 (No. 16-A-186). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

**RULE INVOLVED**

The full text of Federal Rule of Civil Procedure 23 is set out in the appendix at App. 226a.

**STATEMENT**

**I. Nearly every former NFL player who has been examined has been diagnosed with CTE.**

For decades, the NFL went to great lengths to conceal evidence of the effects of concussions, both before and after CTE's discovery. *See generally* Mark Fainaru-Wada & Steve Fainaru, *League of Denial* (2013). But when researchers at Boston University's CTE Center began inspecting the brains of deceased NFL players, they found signs of CTE in almost all of them (87 out of 91, as of 2015). David Geier, *Will football players one day take medicine to prevent brain damage?*, The Post and Courier, Aug. 5, 2015, <http://tinyurl.com/oa39muf>. The results led Dr. Ann McKee, a leading neuropathologist at the CTE Center, the world's largest brain bank focused on traumatic brain injury, to wonder "if every single football player doesn't have this." A.5248.

CTE manifests itself mainly through emotional and cognitive symptoms. A.2287. Early signs include severe headaches and loss of concentration. A.2255. Players go on to struggle with depression, anger, and memory loss, followed by motor impairment, aggression, language difficulty, and dementia. A.2237, 2255. Many players also develop substance-abuse problems, lose basic functioning, and contemplate suicide. A.2287, 5275. As lead class counsel explained, CTE is “the most serious and harmful disease that results from [the] NFL and concussions.” A.2237. Although research has advanced significantly in the seven years since the disease was discovered, at present CTE can be diagnosed definitively only after death. A.2957. Scientists, however, predict that methods to reliably diagnose CTE in living patients are imminent. A.4420, 4597, 4620, 4768, 4953, 5004. UCLA researchers, for example, used brain-imaging tools in 2013 to detect signs of CTE in five living former players. Steve Fainaru & Mark Fainaru-Wada, *UCLA study finds signs of CTE in living former NFL players*, ESPN, Jan. 22, 2013, <http://es.pn/1PkszuAu>.

## **II. Responding to the connection between CTE and football, retired players sue the NFL in droves.**

Amid mounting evidence that football causes CTE and a growing awareness of the NFL’s cover-up, many football players sought legal redress. By 2012, hundreds of personal-injury suits by some 4,500 players nationwide were consolidated before a single district judge in Philadelphia. App. 65a. The plaintiffs’ lawyers proposed a Plaintiffs’ Steering Committee to direct the litigation, and the judge approved its structure—without appointing anyone to represent the thousands of players who had neither sued nor manifested any injury. *Id.*

The core allegation in the plaintiffs’ collective complaint was that the NFL’s conduct had “obfuscated the

-5-

connection between NFL football and long-term brain injury.” App. 66a-67a. The central issue was CTE. A.867-72, 2511 (“This started out as a CTE case. It is a CTE case.”). As the litigation spilled into the following year, the district court ordered the parties to mediate. App. 69a.

After mediation was underway, it became clear that the NFL wanted a way to dispose of future CTE claims, not just the claims of players with cases already on file. Weeks of negotiations on the basic framework of a global resolution thus ensued. Only then, after the contours of a proposed class-action settlement had begun to take shape, did the Steering Committee recognize a conflict of interest between present-injury and future-injury claimants. At that point, the Committee took it upon itself to create putative “subclasses” defined by whether a player had already been diagnosed with one of several qualifying diseases negotiated by the parties. One “subclass” would consist of players currently diagnosed with neurocognitive impairments (including those who had died with CTE) and therefore had present claims against the NFL. The second would consist of retired players who suffered from none of the specified impairments but were—by virtue of having played in the NFL—at serious risk for CTE, though they could not know whether the disease had begun to develop or would develop in the future.

The Committee designated Kevin Turner, who suffered from ALS, to represent the present-claims subclass and recruited Corey Swinson, who had played just one NFL season and had not been diagnosed with any brain injuries, to represent the future-claims players—the majority of the putative class. A.3569-70. Because Swinson had not suffered any known injury from his sole season in the league, he was not one of the 5,000 players who had sued the NFL and therefore had no lawyer. So

-6-

the plaintiffs’ lawyers selected one of their own—an existing member of the Steering Committee (Arnold Levin) who represented nearly a dozen players with cases on file (and retained a one-third contingency stake in their recoveries)—to serve as his “independent” counsel. A.667, 3570, 3578. The plaintiffs’ lawyers selected a different member of the Steering Committee to serve as counsel to the other subclass, even though this lawyer represented a player alleging the same injuries as Levin’s currently injured clients—and in fact *was* (and may still be) one of Levin’s clients. *See* CA3 ECF No. 003112095536, Exs. A & D. The court had no involvement in this process.

### **III. Shortly after the appointment of a mediator, the parties agree to a global settlement.**

By the end of August 2013—just one month after the mediator’s appointment and before even taking any formal discovery against the NFL—plaintiffs’ counsel had signed a term sheet outlining a global settlement with the NFL. App. 71a. One month later, before the parties inked an actual settlement, Swinson died. For more than a month after his death, as the details of the deal were being fleshed out, there was no plaintiff purporting to represent the future-claims players. Then, in mid-October, plaintiffs’ counsel found Shawn Wooden and recruited him to take Swinson’s place, explaining to him the terms of the already-negotiated deal. A.3824, 3902. Wooden agreed not only to serve as a representative but also to “support[] the settlement.” A.3824, 3902. In 2012, he had described himself as “at increased risk of latent brain injuries” generally. A.786. But by the time he was “appointed” the proposed representative of future claimants, Wooden’s claim specified that he was at risk for “dementia, Alzheimer’s, Parkinson’s, or ALS”—but, critically, not CTE. A.1126, 3823.



-7-

In January 2014, plaintiffs' counsel asked the district court to certify the class and approve a proposed settlement. App. 71a. Concerned that the fund would dry up prematurely, the court initially rejected the proposal. App. 71a-72a. Five months later, the parties submitted a revised settlement that "retained the same basic structure as the original," but addressed some of the court's concerns, including removal of the cap. *Id.* In a declaration documenting the negotiations, the mediator stated that plaintiffs' counsel had "passionately advocated" that players be compensated for "dementia, Alzheimer's Disease, Parkinson's Disease, and ALS." A.3807. He did not say the same about CTE. Less than two weeks later, the court preliminarily approved the settlement and conditionally certified the class and two subclasses. App. 73a, A.3824.

The proposed settlement would release the claims of two subclasses: (1) all retired players diagnosed with a "qualifying diagnosis" before the final settlement date (and their spouses and estates), and (2) all retired players not diagnosed with a qualifying diagnosis before the final settlement date (and their spouses and estates). A.5714-15. The six qualifying diagnoses (in descending order of value) are: ALS; Death with CTE (but only if death occurs before April 22, 2015); Parkinson's Disease; Alzheimer's Disease; Level 2 (moderate) dementia and Level 1.5 (early) dementia. A.5730.

**A. Compensation Framework.** The settlement awards compensation on a sliding scale, from a maximum of \$5 million (for ALS) to a maximum of \$1.5 million (for early dementia). A.5740. How much a player receives depends on several factors, including age at diagnosis, seasons played, and previous diagnosis. A.5629. The settling parties' estimates show that the average payment for future dementia claims will be \$190,000, while the average payment for current CTE claims will be

-8-

\$1.44 million. A.1573. Named plaintiff Kevin Turner, who has ALS, will be eligible for compensation. The same is true for players with Parkinson's.

Players with CTE, however, are entitled to compensation only if they died before the final approval date. App. 77a. So, for example, the family of Dave Duerson—who had CTE and died before approval—is eligible for up to \$4 million, the maximum amount paid for a death-with-CTE diagnosis. But the family of Ken Stabler, who died after approval has since been diagnosed with CTE, will receive no compensation for that diagnosis. John Branch, *Ken Stabler, a Magnetic N.F.L. Star, Was Sapped of Spirit by C.T.E.*, N.Y. Times, Feb. 3, 2016, <http://nyti.ms/1SKlJYp>. By foreclosing CTE-based compensation for players who suffer from the disease but have not yet died, and all players who do not yet suffer from it but one day will, the settlement treats future CTE claimants much differently than, say, future ALS claimants.

The only exception to this rule is if the player with CTE also exhibits conditions that trigger one of the other qualifying diagnoses and is able to claim compensation on that basis. But research suggests that these overlaps are only a minority of CTE cases. One study found that CTE was the sole diagnosis in 63% of cases, while Alzheimer's, for example, appeared in about one in ten. A.2255, A.3218. In another study of 33 CTE-infected brains, only 10 also showed signs of dementia. A.2509-10. Even among those with advanced CTE, a quarter were not considered cognitively impaired. *Id.*

As a result, the earliest and most prevalent symptoms of CTE—depression, aggression, chronic headaches, mood swings, and loss of concentration—trigger no compensation at all under the settlement. A.2509, 2955, 2958. The “key symptoms” of CTE, in other words,

“are not compensable.” A.2958. Conversely, the diseases that are compensated—ALS, Parkinson’s, and Alzheimer’s—are those for which the incidence among retired NFL players is significantly lower than the incidence of CTE. A.2380. One study, examining NFL retirees who played at least five seasons, recorded just seven cases of ALS, seven of Alzheimer’s, and three of Parkinson’s—out of 3,439 retired players. A.2379-82, 2400. By contrast, expert research suggests that CTE’s incidence among NFL players may be as high as 96%, dwarfing the conditions that receive compensation. A.2370.

Based on the parties’ own estimates, approximately 15,000 class members (or 72% of the class) will never be compensated. A.1585. Although these players have no way of presently knowing whether they will be diagnosed with CTE, the settlement expressly surrenders their right to assert any future claims based on a future CTE diagnosis, thus ensuring that those who do not also happen to suffer from a triggering neurodegenerative disease will receive no compensation.

**B. Attorneys’ Fees.** Under a “clear-sailing clause,” the settlement allows class counsel to seek up to \$112.5 million in attorneys’ fees without objection from the NFL. App. 95a-96a, A.1082. Unlike the players’ compensation, the fees would be paid immediately. Class counsel can also claim a set-aside worth 5% of all benefits paid, plus contingency fees for class members that they represent individually. A.5671. Based on class counsel’s own damages estimates, the 5% set-aside alone could be worth \$46 million, in addition to the \$112.5 million already guaranteed. A.1599. Because class counsel has not released any information about separate contingency arrangements—including any information that would shed light on whether counsel for either subclass was conflicted—it is impossible to estimate this compensation. The record suggests, however, that the arrange-

ments here mirror those in typical personal-injury cases, where counsel takes 33%. *See* Dist. Ct. Dkt. No. 6356. Although Rule 23 contemplates that class counsel will seek fees contemporaneously with the settlement approval process, so that courts and class members may evaluate the overall deal and counsel's efforts, the district court here allowed counsel to seek these fees separately—following final approval and appeals. App. 95a, A.5671.

#### **IV. The district court approves the settlement.**

The district court certified the class and two subclasses and approved the settlement. App. 60a-212a. The court acknowledged that Rule 23's adequacy requirement "demand[s] undiluted, even heightened, attention in the settlement context." App. 87a (quoting *Amchem*, 521 U.S. at 620). It also recognized that the requirement guards against conflicts of interest by "assur[ing] that differently situated plaintiffs negotiate for their own unique interests"—a special concern with settlement classes that, as here, would bind both "those with present injuries and those who have not yet manifested injury." App. 99a-100a (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 631 (3d Cir. 1996)).

Nevertheless, the court determined that the adequacy requirement was satisfied here. App. 108a. It reasoned that any conflict was eliminated because class counsel, after "[r]ecognizing this problem" during negotiations, "subdivided the Class into two Subclasses," added a representative for the newly created futures subclass, and then designated a lawyer on the Steering Committee to serve as his "independent counsel." App. 100a. The court also found Wooden to be an adequate "futures" representative because he "does not know which, if any, condition he will develop" in the future, and thus "has an interest in ensuring that the Settlement

compensates as many conditions as possible.” *Id.* The court did not attempt to square that statement with the fact that Wooden did not pursue compensation for CTE or specifically allege that he is at risk of developing the disease.

Having certified the subclasses, the court determined that the settlement is fair and does not violate due process—even though it does not compensate any living class members for CTE and forces them to relinquish their right to bring any future “claims relating to CTE” against the NFL. App. 82a-83a. The court explained that the parties had resolved the court’s “primar[y] concern[]”—the possibility that “the capped fund would exhaust before the 65-year life of the Settlement,” thereby creating the risk that some class members would receive nothing simply because their injuries were discovered too late. App. 71a-72a. The court was unconcerned, however, that this same problem exists for CTE, given the disparity in the settlement’s treatment of present and future CTE claims.

The court attempted to justify this disparity in two ways. First, it speculated that providing a “prospective Death with CTE benefit would incentivize suicide because CTE can only be diagnosed after death.” App. 160a. Second, it believed that a living class member “does not need a death benefit because he can still go to a physician and receive a Qualifying Diagnosis” while living. *Id.* The court pointed to studies showing that many players who died with CTE “would have received compensation under the Settlement if they were still alive” because the disease, in its advanced stages, likely “inflicts symptoms compensated by Levels 1.5 and 2 Neurocognitive Impairment and is strongly associated with the other Qualifying Diagnoses in the Settlement.” App. 149a, 157a. Based on that possible partial overlap, the court determined that these diagnoses are adequate

“prox[ies]” for CTE—even though they are worth far less under the settlement—so CTE need not be compensated for any living class members. App. 160a.

The court appeared to understand that potentially thousands of settlement class members will receive no compensation under the settlement and yet later be diagnosed with CTE. But the court took the view that the settlement “reasonably does not compensate Retired Players with the mood and behavioral symptoms allegedly associated with CTE.” App. 155a. The court did so without insisting on any mechanism to ensure that the settlement will be adjusted, if necessary, to reflect future scientific developments regarding CTE. App. 150a. It required only that the parties “confer in good faith about possible revisions to the definitions of Qualifying Diagnoses based on scientific developments.” *Id.*

#### **V. The Third Circuit affirms.**

The Third Circuit affirmed the settlement approval. With respect to adequacy of representation, the court first considered the class lawyers’ mid-negotiation decision to “creat[e] two separate subclasses” and designate “lawyers from the Steering Committee” to serve as subclass counsel for the future-injured subclass. App. 22a. The court rejected the objectors’ argument that this “appointment” failed to ensure adequate representation, in violation of *Amchem*, by depriving the subclass of truly independent counsel. The Third Circuit “agree[d]” that “class counsel could have gone to the District Court and asked it to appoint counsel from the outside,” but found “no precedent requiring such a procedure.” App. 22a-23a.

The court next turned to the adequacy of Arnold Levin—the class lawyers’ choice to represent the future claimants. App. 23a. Levin “represented nine players who alleged current symptoms in two lawsuits against

the NFL” and had “agreed to fees in these cases on a one-third contingency basis.” *Id.* Nevertheless, the court could “not see how” this representation might create a “conflict of interest” and defeat adequacy because Levin “disclosed his representation to the District Court” before the case was converted to a class action, and was nonetheless appointed to the Steering Committee. App. 24a. And, after finding that the record contained “no evidence” that Levin’s individual clients had a qualifying diagnosis under the settlement’s terms, the court concluded that “this is not a situation where subclass counsel has clients in both subclasses.” App. 24a-25a.

Having endorsed the representation structure, the court turned to the class representatives. The court first rejected the objectors’ argument that the futures-subclass representative (Wooden) was inadequate because he had not alleged a claim for future risk of CTE. Although Wooden did not actually plead this claim (unlike others in the future-injured subclass), the court concluded that it was sufficient that his complaint stated that he was at “an increased risk of latent brain injuries” generally, reasoning that “[t]his allegation covers the risk of CTE.” App. 25a. In the court’s view, “what matters more than the words Wooden used” in his complaint “are the interests he would have in representing the subclass.” *Id.* Because “Wooden, and all retired NFL players for that matter, are at risk of developing the disease,” any one “would have an interest in compensation for CTE in the settlement.” *Id.*

Finally, the court turned to the potential *Amchem* conflict that dogged the class from the start. The court described as “on point” the district court’s conclusion that “no fundamental conflict” existed: “[S]imply put, this case is not *Amchem*.” App. 28a-29a. “The most important distinction,” the panel explained, “is that class counsel here took *Amchem* into account by using the



subclass structure to protect the sometimes divergent interests of the retired players.” App. 29a. According to the panel, the subclasses were “represented in the negotiations by separate class representatives with separate counsel, and, as discussed, each was an adequate representative.” *Id.* In the court’s view, “[t]his alone,” was a “significant structural protection for the class that weighs in favor of finding adequacy.” *Id.*

## REASONS FOR GRANTING THE PETITION

### I. The Third Circuit’s crabbed view of this Court’s landmark decisions in *Amchem* and *Ortiz* cannot be reconciled with other circuits’ cases.

A. This Court has twice waded into the law of class-action settlements—and both times it addressed “the most difficult problem” in class-action jurisprudence: the problem of “future claimants” in classes designed for settlement. Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. Pa. L. Rev. 1901, 1901 (2000). In both cases, the Court confronted the question of what “structural assurance[s]” are necessary to guarantee that a settlement-only class of all claimants who may one day hold a particular claim—the currently injured, as well as those not yet manifesting injury—reflects “fair and adequate representation for the diverse groups and individuals.” *Amchem*, 521 U.S. at 627; *see Ortiz*, 527 U.S. 815. And in both cases, the Court held that the settlements fell well short of the mark. Taken together, *Amchem* and *Ortiz* “wrote the ground rules for adequate representation in the settlement-only class context.” *In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 827 F.3d 223, 232 (2d Cir. 2016).

1. *Amchem* came first. Like this case, it began as multidistrict mass-tort litigation, and was converted into a class action only “to achieve global settlement of current and future asbestos-related claims.” 521 U.S. at 597.



Because the defendant made clear that “it would resist settlement of [pending] cases absent some kind of protection for the future,” the Plaintiffs’ Steering Committee—all of whom represented clients with pending claims—tried to craft a deal that would provide that protection. *Id.* at 601. The future claimants were thus added to the case strictly for settlement purposes; the class “was not intended to be litigated.” *Id.* at 600-01.

Although the settlement-only class was united in that each member had been exposed to asbestos at one time or another, the similarities ended there. Class members had been “exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods.” *Id.* at 624. And the extent of their injuries was just as varied. Some were critically ill with lung cancer or mesothelioma. Others had no symptoms at all. Still others lay in the vast expanse between the two, suffering from a range of ailments related to asbestosis. And still more were spouses who had endured a loss of consortium.

Affirming “a long, heavily detailed opinion by Judge Becker,” this Court decertified the class and invalidated the settlement. *Id.* at 608; see *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996). In doing so, the Court discussed how Rule 23’s procedural “safeguards” work to protect absent class members “in the settlement-class context.” 621 U.S. at 621. The Court held that those safeguards—under Rule 23(a) and (b)—must “preexist any settlement,” and “demand undiluted, even heightened, attention in the settlement context.” *Id.* at 620, 623. An after-the-fact fairness hearing is no surrogate for steadfast adherence to “the standards set for the protection of absent class members,” which “serve to inhibit appraisals of the chancellor’s foot kind—class certifications dependent upon the court’s gestalt judg-

ment or overarching impression of the settlement’s fairness.” *Id.* at 621.

Rule 23(a)(4), in particular, focuses on the adequacy of the class representatives and the “competency and conflicts of class counsel.” *Id.* at 626 n.20. It requires that each representative “be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” *Id.* at 625-26. A fatal feature of the *Amchem* class was that “named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses,” and yet the settlement matrix was zero-sum-game: It entailed “essential allocation decisions designed to confine compensation and to limit defendants’ liability.” *Id.* at 626-27. And those decisions tended to benefit certain present claimants at the expense of everyone else: The settlement did not account for changing science or inflation, “only a few claimants per year [could] opt out at the back end,” and “loss-of-consortium claims [were] extinguished with no compensation.” *Id.*

As a result, the Court held, “the interests of those within the single class [we]re not aligned.” *Id.* at 626. The Court zeroed in on the “most salient[]” intra-class conflict (the present/future divide), explaining that, “for the currently injured, the critical goal is generous immediate payments,” but “[t]hat goal tugs against the interest of [future-injury] plaintiffs,” who may not “realize the extent of the harm they may incur,” and thus would “seek sturdy back-end opt-out rights and ‘causation provisions that keep pace with changing science and medicine, rather than freezing in place the science.”” *Id.* at 610-11, 626, 628. By not accounting for this fundamental conflict at the threshold, the parties’ “global compromise” provided “no structural assurance of fair and adequate representation for the diverse groups and individuals affected.” *Id.* at 627. Neither “the terms of the set-

-17-

tlement” nor “the structure of the negotiations” could assure the Court that the absentees had been adequately represented. *Id.*

2. Two years later, the Court revisited Rule 23’s adequacy requirement in *Ortiz*, another case involving the “elephantine mass of asbestos cases.” 527 U.S. at 821. *Ortiz* began much like *Amchem* (and this case) did, with the filing of thousands of individual personal-injury cases. One of the main defendants in those cases then “approached a group of leading asbestos plaintiffs lawyers” to discuss a possible “global settlement” of its “asbestos personal-injury liability.” *Id.* at 823-24. At “about midnight” in “a coffee shop in Tyler, Texas,” on the eve of a key oral argument in one of the cases, the lawyers agreed on the dollar amount for complete peace: \$1.535 billion. *Id.*

Days later, a lawsuit was filed seeking certification of a settlement-only class that would comprise three categories: those with present claims not yet brought or settled, those with future claims, and all beneficiaries “past, present and future.” *Id.* at 825-26. The named plaintiffs had not been designated as putative representatives until “after the agreement in principle was reached,” and simply “relied on class counsel in subsequent settlement negotiations.” *Id.* at 856 n.31.

As in *Amchem*, this Court decertified the class and wiped out the deal, finding that it lacked the requisite “procedural protections.” *Id.* at 847. The Court reiterated that these protections must “preexist any settlement,” and take on heightened importance in settlement classes, because certification “effectively concludes the proceeding save for the final fairness hearing.” *Id.* at 858, 849. And “a fairness hearing under Rule 23(e) is no substitute for rigorous adherence” to Rule 23(a). *Id.* at 849. Unlike *Amchem*, however, which “concentrated on

the adequacy of [the] named plaintiffs” (or lack thereof), this time the Court trained its attention on class counsel. *Id.* at 856 n.31.

The Court pointed to “two instances of conflict” that were “well within the requirement of structural protection recognized in *Amchem*.” *Id.* at 857. The first was the divide between present and future claimants. The Court found it “obvious after *Amchem*” that this conflict “requires division into homogeneous subclasses” with “separate representation to eliminate conflicting interests of counsel.” *Id.* at 856. Yet the plaintiffs’ lawyers who negotiated the agreement included “at least some of the same lawyers” who had reached side deals in other asbestos cases that were “contingent on a successful” global resolution. *Id.* at 852. This created a serious risk of skewed incentives, because “with an already enormous fee within counsel’s grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.” *Id.* at 852 n.30. In the Court’s view, this was an “egregious example of the conflict noted in *Amchem*.” *Id.* at 853.

The “second instance of disparate interest within the certified class” was that some class members had “more valuable claims” than others because they had been exposed to asbestos products before expiration of the defendant’s insurance coverage. *Id.* at 857. The settlement, however, treated these claims equally. *Id.*

In light of these “intraclass conflicts,” the Court held that it was “essential” that they be “addressed by recognizing independently represented subclasses”—something that had not happened. *Id.* at 864. And the Court strongly suggested that a district court was required to ensure that these mandatory structural protections were in place “at the precertification stage.” *Id.* at 858. Echoing Judge Smith’s dissent in the Fifth Circuit, the Court faulted the district court for failing to heed

this obligation: It “took no steps at the outset to ensure that the potentially conflicting interests of easily identifiable categories of claimants [would] be protected” in negotiations, “relying instead on its post-hoc findings at the fairness hearing” to conclude that the various interests “in fact had been adequately represented.” *Id.* at 831-32; see *In re Asbestos Litig.*, 90 F.3d 963, 1026 (5th Cir. 1996) (Smith, J., dissenting) (“[A]n after-the-fact substantive review is far too little, far too late,” for the court cannot “turn back the clock and appoint different counsel to renegotiate the settlement fairly.”). By failing to rigorously analyze the structural shortcomings, the Fifth Circuit (like the district court) had “disregarded *Amchem*.” 527 U.S. at 831.

The Court also refused to allow these shortcomings to be “mitigated” based on the settlement’s substance, or because “separate counsel” could “not to be had in the short time that a settlement agreement was possible.” *Id.* at 863. The Court was firm on this point: a court may not “lower the structural requirements of Rule 23(a) as declared in *Amchem*” just because “the clock is about to strike midnight.” *Id.* If “an allowance for exigency” could “make a substantial difference in the level of Rule 23 scrutiny, the economic temptations at work on counsel in class actions [would] guarantee enough exigencies to take the law back before *Amchem*.” *Id.* at 864.

**B.** The “landmark decisions” in *Amchem* and *Ortiz* “set down important standards and guidelines” for courts and litigants. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc) (Scirica, J., concurring). But they provide “relatively little solid guidance” and leave many questions unanswered. John D. Aldock & Richard M. Wyner, *The Use of Settlement Class Actions to Resolve Mass Tort Claims After Amchem*, 33 Tort & Ins. L.J. 905, 913-14 (1998). “[A]mong the most vexing [questions] to arise in the aftermath of *Amchem*”

concerns “the outer limits on the insistence in *Amchem* upon subclassing”—a question on which *Ortiz* may have “just add[ed] to the confusion.” Richard A. Nagareda, *The Law of Class Actions and Other Aggregate Litigation* 117, 119 (2009). And even if a court is asked to certify subclasses after the fact, what procedural protections must exist so that the court can be sure that the interests of each divergent group—especially those not yet manifesting injury—were truly represented at the negotiating table? The circuits (primarily the Second and Third, where these issues most often arise) have given vastly different answers to these questions, applying varying degrees of rigor in carrying out the dictates of *Amchem* and *Ortiz*.

The Second Circuit, unlike the Third Circuit below, has repeatedly enforced Rule 23’s procedural protections with “added solicitude” in the settlement context, standing guard against the “imperatives of the settlement process.” *Interchange*, 827 F.3d at 235. Recognizing that a settlement *itself* “can influence the definition of the classes and the allocation of relief,” the Second Circuit has vigorously policed settlements to ensure that safeguards were in place *before* the deal was inked—especially when “[c]lass counsel stood to gain enormously if they got the deal done.” *Id.* at 234, 236; accord *Smith v. Sprint Comm’ns Co.*, 387 F.3d 612, 614 (7th Cir. 2004) (“Rule 23 demands” protection “prior to the settlement itself.”).

The Second Circuit has therefore consistently decertified settlement classes “when categories of claims have different settlement values” and lack subclasses and “separate counsel.” *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 250-51, 253 (2d Cir. 2011); see *Interchange*, 827 F.3d at 232-36; *Cent. States Se. & Sw. Areas of Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 246 (2d Cir.

2007); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992) (quoted with approval by *Amchem*). As the Second Circuit explained just this past summer, “divergent interests require separate counsel when it impacts the ‘essential allocation decisions’ of plaintiffs’ compensation and defendants’ liability.” *Interchange*, 827 F.3d at 233-34 (stressing need for “separate representation” when one group’s interests are “antagonistic to the others on a matter of critical importance—how the money would be distributed”). “The rationale is simple: how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?” *Literary Works*, 654 F.3d at 253.

The Second Circuit has held firm and fast to this view even in cases where the risks of divergent interests were less obvious than in *Amchem*, *Ortiz*, and this case. In *Literary Works*, for example—unlike here (and *Amchem*)—the named plaintiffs held “a variety of claims across the spectrum” (including all compensation categories), “the attorneys conducting the negotiations . . . represented holders of all three species of claims from the outset,” and “[n]o claims unique to a portion of the class [we]re forfeited without compensation.” *Id.* at 261-62 (Straub, J., dissenting). And “unlike *Amchem*” (and this case), “where one defendant refused to settle present claims until future claims were included”—creating a strong “incentive” for the “plaintiffs’ representatives” to “bargain away exposure-only claimants’ rights in order to ensure a generous settlement for their original, currently-injured clients”—“[n]o such incentive existed” in *Literary Works*. *Id.* at 263. Still, the Second Circuit invalidated the settlement and required subclasses.

In doing so, the court acknowledged that “[t]he Third Circuit”—even before this case—has taken a different approach, approving a settlement that “allocat-



ed the recovery among three distinct classes of plaintiffs without creating subclasses.” *Literary Works*, 654 F.3d at 256 n.10 (discussing *In re Insurance Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009)); see also *Literary Works*, 654 F.3d at 261 (Straub, J., dissenting) (quoting another Third Circuit case holding that settlement’s unequal allocation “does not demonstrate a conflict between groups,” just “the relative value of the different claims,” *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 347 (3d Cir. 2010)). But the Second Circuit “hesitate[d] to conclude” the same. *Literary Works*, 654 F.3d at 256 n.10. Instead, it probed the “settlement’s substance for evidence of prejudice to the interests of a subset of plaintiffs,” and found some. *Id.* at 252. Because the disparate treatment of that subset lacked “credible justification,” it “strongly suggest[ed] a lack of adequate representation for those class members.” *Id.* at 254.

Even when the Second Circuit has approved settlement classes, it has “explicitly distinguished” the settlement from “those in *Amchem*, *Ortiz*, and *Literary Works* on the ground that it did not extinguish claims other than those that were the subject of relief in the settlement.” *Interchange*, 827 F.3d at 240 (discussing *Charron v. Wiener*, 731 F.3d 241, 252 (2d Cir. 2013)). But when the release is *broad*er than the relief provided, such that some people could receive “valueless relief while releasing a host of claims of unknown value,” the court has not hesitated to strike down the deal. *Interchange*, 827 F.3d at 239.

In fact, the Second Circuit’s procedural protections are so robust that it has allowed a *collateral attack* on a global settlement (in the Agent Orange litigation), holding that “the plaintiffs could not be bound by the settlement release” because “their class representative negotiated a settlement and release that extinguished their claims without affording them any recovery.” *Id.* at 237



(discussing *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260-61 (2d Cir. 2001), *aff'd in relevant part by an equally divided court*, 539 U.S. 111 (2003)). Even though Rule 23 did not apply (because it was not a direct appeal), the court held that enforcing the settlement's release would violate due process. *Id.*

The Eleventh Circuit, in another collateral attack, was similarly attentive to procedural concerns while weighing whether a decade-old settlement had provided adequate representation sufficient to satisfy due process. *Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012). Although the court ultimately enforced the settlement's release, it did so only after taking pains to assure itself that the settlement had provided due process through a "combination" of two things. *Id.* at 1324. First, "well before" negotiations implicating a conflict had begun, the district court appointed six representatives reflecting the "full spectrum" of claimants, including "a representative with no manifested injury, one with minor to moderate injuries, and one who was totally disabled." *Id.* at 1324 & n.26. Second, after the district court appointed class counsel, it "specifically brought in" separate counsel "for the sole purpose of representing those plaintiffs with only potential, future injuries." *Id.* And this lawyer—as "the parties agreed, and [the court] was aware"—"represented solely future claimants with no current manifestations of injury." *Id.* at 1326.<sup>1</sup>

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<sup>1</sup> Consistent with this approach, when the Second Circuit has required subclasses, that protection was put in place on remand before a new deal was negotiated. *See, e.g., In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 481 (S.D.N.Y. 1995), *aff'd in relevant part*, 78 F.3d 764 (2d Cir. 1996) (explaining that new settlement was submitted on remand only *after* "designation of new subclasses and strenuous negotiation among them"); *In re Literary* (continued ...)

C. The Third Circuit’s decision below cannot be reconciled with these cases. In many ways, it marks the culmination of that circuit’s gradual drift away from Judge Becker’s opinions in *Georgine* and *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (“*GM Trucks*”)—the first circuit opinion to explore the issues raised by settlement classes in depth—toward a far more permissive approach. The panel in this case approved a global settlement with two named plaintiffs: one for the entire present-claimant “subclass” (a class member with ALS, the rarest and most highly compensated disease under the settlement, who thus had “no incentive to maximize the recovery” for others, *Literary Works*, 654 F.3d at 254), and one for the entire future-claimant “subclass.” In stark contrast with the Second Circuit, the Third Circuit thought that ensuring representation for class members with other compensable diseases was unnecessary because it “risked slowing or even halting the settlement negotiations.” App. 28a.

More importantly, separate counsel for the future claimants was not “brought in” after certification, as in *Juris*; instead, “class counsel designated lawyers from the Steering Committee to serve as subclass counsel,” and the district court signed off on this designation only afterward. App. 22a. The Third Circuit was not troubled

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*Works in Elec. Databases Copyright Litig.*, No. M-21-90 (MDL No. 1379), ECF No. 7, at 1 (S.D.N.Y., filed Nov. 22, 2013) (explaining that new counsel was brought in to represent new subclass on remand, *after which* the parties “embarked on months of negotiations”); *In re Medco Health Solutions, Inc., Pharmacy Benefits Mgmt. Litig.*, No. 03-MDL-1508, ECF No. 192 (S.D.N.Y. June 26, 2009) (approving new settlement on remand that was negotiated by subclass counsel appointed *before* negotiations).

by the fact that the lawyer for the future claimants simultaneously “represented nine players who alleged current symptoms,” and “agreed to fees in these cases on a one-third contingency basis,” because the district court (post hoc) was “satisfied that he was an adequate representative.” App. 23a-24a. And the Third Circuit signaled that it agreed with the district court that there was “no fundamental conflict” between future and current claimants, saying that the court’s “analysis was on point.” App. 28a-29a.

As for substance, the Third Circuit was again in serious tension with the Second Circuit, where any substantive divergence on a “fault line[] along which [a] conflict runs” is strong evidence of inadequate representation absent “credible justification.” *Literary Works*, 654 F.3d at 254, 257. The Third Circuit, however, did not provide *any* justification for why the deal expressly extinguishes future CTE claims, yet does not compensate for them, nor why current CTE claims are valued so highly if the settlement was not designed to compensate CTE even for those already diagnosed with the disease. The court found that the settlement’s disparate treatment of CTE claims—up to \$4 million for a pre-settlement diagnosis, but nothing for a post-settlement diagnosis—was “not evidence of a debilitating conflict of interest.” App. 31a. In addition, the court demonstrated no awareness of how “the potential for gigantic fees” can skew incentives, and cited “the presence of a mediator and special master” as a key “structural protection[],” App. 29a, even though the Second Circuit has held that these features “emphatically cannot remedy the inadequate representation.” *Interchange*, 827 F.3d at 234.

If this litigation had been consolidated in the Second Circuit, there is little doubt it would have come out differently. Indeed, the conflict between the Second and Third Circuits is so pronounced that, if this Court does

not step in, then any player who later develops CTE but does not qualify for compensation under the settlement will be able to bring a successful *collateral attack* in New York under binding Second Circuit precedent because “their class representative negotiated a settlement and release that extinguished their claims without affording them any recovery.” *Id.* at 237. This Court should not tolerate such a fundamental disagreement between two circuits that routinely handle complex nationwide class-action settlements. It should grant certiorari to resolve the uncertainty, reassert and clarify the meaning of its seminal settlement cases, and reverse the Third Circuit.

## **II. The Third Circuit’s decision contradicts *Amchem* and *Ortiz* and delivers a dangerously flawed blueprint for future class cases.**

The Third Circuit’s laissez-faire approach is not just incompatible with the decisions of other circuits—it also contravenes this Court’s cases. Left to stand, it would “take the law back before *Amchem*,” *Ortiz*, 527 U.S. at 864, providing litigants with an all-too-easy template for circumventing Rule 23. Many more mass sports-concussion cases are looming<sup>2</sup>—and now, so are the flawed representation strategies approved here. The Court should take this opportunity to correct course.

1. Had the Third Circuit followed this Court’s command of “rigorous adherence” to Rule 23(a)(4), it would

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<sup>2</sup> See, e.g., *Laurinaitis v. World Wrestling Entertainment, Inc.*, No. 16-1209 (D. Conn) (professional wrestling); *Mehr v. Federation International De Football Ass’n*, No. 14-3879 (N.D. Ca.) (professional soccer); *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, No. 14-2551 (D. Minn.) (professional hockey); *Archie v. Pop Warner Little Scholars*, No. 16-6603 (C.D. Ca.) (Pop Warner football); *In re Nat’l Collegiate Athletic Ass’n Student-Athlete Concussion Litig.*, MDL No. 2492 (N.D. Ill.) (NCAA football).

have reversed the settlement—not deferred to the district court’s “post-hoc findings at the fairness hearing” that the absent class members “in fact had been adequately represented.” *Id.* at 832, 849.

The parallels between this case and *Amchem/Ortiz* jump off the page. Each of the three cases began as consolidated personal-injury litigation that was converted to a global settlement only because the defendant insisted on extinguishing claims “not yet in litigation.” *Amchem*, 521 U.S. at 601. Each involved a settlement negotiated exclusively by members of the Plaintiffs’ Steering Committee representing “thousands of plaintiffs with then-pending” claims, “although those lawyers then had no attorney-client relationship with [future] claimants.” *Id.* at 600-01. Each involved a tiny number of named plaintiffs seeking to represent a broad spectrum of current and future claimants with potentially compensable injuries. And each involved a settlement that contained clear substantive indicators that the conflict was anything but academic, resulting in serious, unjustifiable disparate treatment, strongly suggesting that the rights of future claimants had been used as bargaining chips to benefit current claimants and their lawyers.

The only difference is that here—*after* the basic framework of the deal had been hashed out in nearly two months of negotiations—the plaintiffs’ lawyers devised a strategy to paper over the conflict. Without notifying the district court, they designated one of their own members to serve as counsel to a newly created “subclass” that would encompass every class member who does not qualify for compensation under the terms of the framework that had just been negotiated (whether currently injured or not). A.1116-17. They also named a former player with one season of NFL experience to serve as the lone representative for this subclass, and later re-

placed him with someone only after he agreed to “support[] the settlement.” A.3569, 3902.

This cannot possibly be the kind of representation that this Court had in mind when it said that, in cases of this sort, Rule 23 requires “the structural protection of independent representation,” *Ortiz*, 527 U.S. at 855, by those “who understand that their role is to represent solely the members of their respective subgroups,” *Amchem*, 521 U.S. at 627. As in *Ortiz*, “the District Court took no steps at the outset to ensure that the potentially conflicting interests” of differently situated claimants were protected. 527 U.S. at 831-32. The result was a disabling conflict: The handpicked lawyer for future claimants “represented nine players who alleged *current* symptoms,” while retaining a one-third contingency stake in their cases, App. 23a—“an egregious example of the conflict noted in *Amchem*,” *Ortiz*, 527 U.S. at 853. In fact, he even shared a client with the lawyer designated as counsel to the *other subclass* (another member of the Steering Committee with similar clients). See CA3 ECF No. 003112095536, Exs. A & D.

The Third Circuit could “not see how” these agreements “created a conflict of interest” because subclass counsel “disclosed his representation” in “an application for the Steering Committee.” App. 23a-24a. But this disclosure came well before the case was converted to a class action. And why should this matter, in any event, to the legal question whether there was adequate, unconflicted representation during negotiations? The district court did not address that question until after the fact, in its “post-hoc findings at the fairness hearing.” *Ortiz*, 527 U.S. at 832. That does not satisfy Rule 23.

2. Were there any doubt that the future claimants did not receive adequate representation here, it would be dispelled by “hom[ing] in” on “the terms of the settle-

ment.” *Amchem*, 521 U.S. at 619, 627; see *Nat’l Super Spuds v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 (2d Cir. 1981) (Friendly, J.) (“The inadequacy of the representation” is “apparent from examination of the settlement itself.”). This settlement creates a massive “disparity between the currently injured and [future-injury] categories of plaintiffs,” *Amchem*, 521 U.S. at 626—the class’s most salient conflict. Under the settlement’s terms, if a class member died with CTE before April 22, 2015—that is, if he had a *current* CTE claim on the day of final approval—his estate will receive up to \$4 million. But if a class member dies after April 22, 2015—that is, if he has a *future* CTE claim—his estate will get no monetary award at all. Future-injury plaintiffs, in other words, are forced to release all “claims relating to CTE,” App. 82a-83a, yet they “will never enjoy the [CTE] benefits of the settlement.” *GM Trucks*, 55 F.3d at 801.

It is hard to think of more “conspicuous evidence” of “an intra-class conflict.” *Id.* When a “settlement treats [one group] quite differently from [another],” it has “serious implications for the fairness of the settlement and the adequacy of representation of the class.” *Id.* at 777. That is especially true here, where the disparate treatment concerns the one injury that triggered this flood of litigation in the first place: death with CTE. Although the Third Circuit tried to explain away (rather than rigorously scrutinize) the disparate treatment of CTE, it had no explanation for why the settlement “throw[s] to the winds” future CTE claims without compensating them, *Super Spuds*, 660 F.2d at 17 n.6, nor why a current CTE claim is valued so highly if it were really meant as a proxy for other (far less valuable) diagnoses. See App. 30a-31a. And the Third Circuit inexplicably believed that a toothless meet-and-confer provision “allows the settlement to keep pace with changing science.” App. 29a.

-30-

At bottom, the Third Circuit misunderstood its role as helping facilitate a global resolution of a crisis confronting America's most popular sport—not enforcing Rule 23. “But the benefits of litigation peace do not outweigh class members’ due process right to adequate representation.” *Interchange*, 827 F.3d at 240. Pro football may enjoy an exemption from the antitrust laws (and paying taxes), but it has no license to achieve a global release of liability by trampling on Rule 23 and due process.

### CONCLUSION

The petition for a writ of certiorari should be granted.



-31-

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September 26, 2016

# Exhibit HH

No. 16-413

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**In the Supreme Court of the United States**

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RAYMOND ARMSTRONG, et al.,

*Petitioners,*

v.

NATIONAL FOOTBALL LEAGUE and NFL PROPERTIES LLC,

*Respondents,*

KEVIN TURNER and SHAWN WOODEN,

on behalf of themselves and all others similarly situated,

*Respondents.*

---

*On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit*

---

**REPLY BRIEF FOR PETITIONERS**

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TABLE OF CONTENTS

Table of authorities ..... ii

Reply brief .....1

    I. The circuit split and the prospect of a  
        collateral attack based on that split are  
        undeniable, and respondents barely attempt  
        to show otherwise. ....1

    II. Recent developments underscore the need  
        for this Court’s immediate review.....5

    III. Because the settlement releases the future  
        claims of thousands of absentees for nothing  
        —without providing the requisite structural  
        protections—it violates *Amchem* and *Ortiz*.....6

Conclusion .....11

## TABLE OF AUTHORITIES

### Cases

<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	<i>passim</i>
<i>In re Literary Works in Electronic Databases Copyright Litigation</i> , 654 F.3d 242 (2d Cir. 2011).....	2
<i>In re Payment Card Interchange Fee &amp; Merchant Discount Antitrust Litigation</i> , 827 F.3d 223 (2d Cir. 2016).....	2, 3, 4
<i>Ortiz v. Fibreboard, Corp.</i> , 527 U.S. 815 (1999).....	1, 7, 8
<i>Stephenson v. Dow Chemical Co.</i> , 273 F.3d 249 (2d Cir. 2001).....	2
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011).....	10

### Other authorities

Ken Belson, <i>Judge Tells N.F.L. to Reveal Some Secrets About Concussions</i> , N.Y. Times, Oct. 31, 2016 .....	6
Ken Belson, <i>Researchers Make Progress Toward Identifying C.T.E. in the Living</i> , N.Y. Times, Sept. 26, 2016 .....	6
Bob Hohler, <i>Former Patriot Kevin Turner died from CTE, not ALS</i> , Boston Globe, Nov. 3, 2016 .....	5
Joe Nocera, <i>Is the N.F.L.’s Concussion Settlement Broken?</i> , N.Y. Times, Oct. 7, 2016 .....	6

## REPLY BRIEF FOR PETITIONERS

Only twice in its history has this Court addressed the governance of class-action settlements. Two decades ago, the Court held that when a global settlement makes “essential allocation decisions” among competing class members—like current and future claimants—the court must scrutinize “the terms of the settlement” and “the structure of the negotiations” for “assurance of fair and adequate representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997). At the very least, “intraclass conflicts” require “division into homogeneous subclasses”—with “separate representation”—to guard “against inequity and potential inequity at the precertification stage.” *Ortiz v. Fibreboard, Corp.*, 527 U.S. 815, 856-58, 864 (1999).

Lacking further guidance, lower courts have divided over the meaning of these landmark cases, with the Second and Third Circuits adopting directly conflicting approaches. *See* 135 Former Players Br. 5 (“[T]here is a divergence among the circuits in applying [*Amchem* and *Ortiz*].”); Public Citizen Br. 14 (“The Second Circuit’s approach . . . would require a different outcome.”). This Court’s intervention is urgently needed—not only to resolve that split for the sake of future cases but also to prevent it from unraveling this very settlement.

### **I. The circuit split and the prospect of a collateral attack based on that split are undeniable, and respondents barely attempt to show otherwise.**

A. Respondent NFL neither discusses nor cites any of the Second Circuit cases that comprise the split. The closest it comes is an oblique reference to “petitioners’ efforts to conjure a circuit split”—a carefully crafted sentence that stops short of denying the split’s existence—and an unexplained assertion that “there is no reason to believe that the Second Circuit would have

-2-

reached a different conclusion.” NFL BIO 24. Yet neither the NFL nor class counsel even attempt to run the facts of this case through the Second Circuit’s legal framework, which holds that settlement classes must be decertified “when categories of claims have different settlement values,” yet lack subclasses and “separate counsel.” *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 250-51, 253, 256-57 (2d Cir. 2011). The Second Circuit’s approach also demands decertification when the settlement trades away the “future claims” of some class members “without affording them any recovery,” for they “could not have been adequately represented.” *In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 827 F.3d 223, 237 (2d Cir. 2016), *application for extension of time to file cert. petition granted*, No. 16A280 (due Nov. 23).

This settlement has both of these features. It not only “picks winners and losers among the injured class without providing necessary structural protections,” Public Citizen Br. 2-3, but also expressly extinguishes potentially thousands of future CTE claims for nothing—while providing up to \$4 million to the select few with a current CTE claim as of April 22, 2015 (a category limited to those deceased players whose brains were inspected by Boston University’s CTE Center by that date). There is no serious argument that this settlement could be upheld under the Second Circuit’s current precedent. That is a classic definition of a split.

**B.** In fact, the conflict is so pronounced that it raises the prospect that hundreds or even thousands of players diagnosed with CTE after the cutoff date will bring collateral attacks in federal court in New York City—where the NFL is headquartered. *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260-61 (2d Cir. 2001). On this point, the NFL simply punts: It says nothing—nothing at all—about this scenario. And class counsel, for

their part, add only a dismissive footnote (at 22 n.5) suggesting that “the Second Circuit has backed away” from *Stephenson*. But, just this past summer, the Second Circuit explicitly reaffirmed *Stephenson*’s holding that absentees cannot be “bound by the settlement release” if “their class representative negotiated a settlement and release that extinguished their claims without affording them any recovery.” *Interchange*, 827 F.3d at 237. To hold otherwise would “violate[] due process”—an even stricter standard than adequacy. *Id.* That neither respondent—in 70-plus pages of combined briefing—makes any effort to confront this holding says all there is to say about just how irreconcilable the conflict really is.

The split is therefore not just a matter of theoretical concern. Generally speaking, circuit conflicts are undesirable because they undermine the uniformity of federal law—a concern that is also implicated here. But what makes this conflict truly intolerable is that it could one day lead to different results in this very litigation—threatening to unravel part of the settlement on the back end, or at least to invite additional litigation about whether someone with a potentially valuable tort claim (like a wrongful-death claim) can be bound by a settlement purporting to release that claim for nothing.

If this Court does not intervene, that day might not be far off. To illustrate the point: Ken Stabler, Oakland Raiders legend and recent Hall of Famer, died in July 2015, and “his autopsy revealed severe stage-3 CTE.” 135 Former Players Br. 2. But because he died “a mere two and a half months after the cut off” date, “Mr. Stabler and his heirs cannot recover for CTE injuries under the settlement as currently drafted,” and indeed “can recover nothing under the current settlement.” *Id.* at 3. If so, what is to stop the executor of Mr. Stabler’s estate (an amicus in this case) from filing suit in federal court in Manhattan, just a few miles south from the NFL’s head-



quarters? And if that happens, and it is successful under Second Circuit precedent, is there any doubt that this Court will then be asked to step in? Far better to do so now, on direct review.

The NFL's response to the circumstances of people like Mr. Stabler is to assert (at 27) that they are "fortunate" and "asymptomatic." That could not be further from the truth. "Before his death, Mr. Stabler suffered from mood swings and other mental issues that destroyed [his] marriage," while other players who might have CTE (but not a qualifying illness) are "suffer[ing] from severe depression" and "homelessness"; "cannot drive [] or hold a job"; struggle with "bouts of aggression, anxiety, poor impulse control, and anger"; are afflicted with "severe insomnia"; and so on. *Id.* at 2-3.

In a similar vein, class counsel—fiduciaries for these players—say that their pleas "cannot be taken seriously" (at 32), because they lacked the oracular foresight to know whether to opt out of the class based on a diagnosis they can't yet confirm, or to otherwise predict what their futures may hold. But future claimants "may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Amchem*, 521 U.S. at 628. And amici's "grave concerns" should very much be taken seriously. 135 Former Players Br. 1. The possibility of a collateral attack should be taken seriously. The fact that many class members will receive "valueless relief while releasing a host of claims of unknown value," *Interchange*, 827 F.3d at 239—even if "their CTE causes economic ruin, destroys their family, or kills them," 135 Former Players Br. 8—should be taken seriously. A stark "divergence among the circuits" on how to apply "this Court's teachings in *Amchem* and *Ortiz*" should be taken seriously. *Id.* at 5. That this case is "beset by intra-class conflicts and a lack of structural protections for absent class members," and hence "suffers from the

same deficiencies that caused this Court to reject the settlements in *Amchem* and *Ortiz*,” should be taken seriously. *Id.* at 5, 13. And the need for clear guidance to courts and litigators alike on a question of profound importance—what structural protections are necessary before a settlement may extinguish the claims of a diverse group of class members, including the not-yet-injured—should likewise be taken seriously.

## **II. Recent developments underscore the need for this Court’s immediate review.**

The problems with the settlement, and the need for this Court’s review, are highlighted by several recent developments—none of which respondents mention. The first concerns the sole class representative for the present claimants, Kevin Turner. Although Mr. Turner was thought to have ALS when this settlement was negotiated, researchers at Boston University’s CTE Center announced earlier this month that he actually had CTE. *See Hohler, Former Patriot Kevin Turner died from CTE, not ALS*, Boston Globe, Nov. 3, 2016, <http://bit.ly/2g2mi2g> (“This is not ALS; this is CTE.”). Perhaps this development will affect the compensation provided to his survivors (because he had a *future* CTE claim, valued at \$0 by the settlement). Or perhaps it will not (because his survivors may still be able to collect up to \$5 million for ALS—the one diagnosis worth more than CTE—which only 31 class members are expected to receive, A.1585). But either way, this startling development only underscores the inadequacy of representation and the artificiality of the lines drawn by the settlement.

It also highlights how quickly the landscape is changing with respect to CTE. Indeed, in a second major development, announced on the same day that this petition was filed, scientific researchers said that they have made progress toward diagnosing CTE in the living. *See*

Belson, *Researchers Make Progress Toward Identifying C.T.E. in the Living*, N.Y. Times, Sept. 26, 2016, <http://nyti.ms/2doVE5D>; see also Nocera, *Is the N.F.L.'s Concussion Settlement Broken?*, N.Y. Times, Oct. 7, 2016, <http://nyti.ms/2dNq4fl> (“I really do foresee being able to diagnose C.T.E. pretty accurately while people are alive sometime in the next five to 10 years. . . . Hopefully, even earlier.”). The settlement, however, seeks to “freez[e] in place the science” of yesteryear, *Amchem*, 521 U.S. at 611, blocking compensation for anyone but the very earliest diagnosed with the disease.

Finally, in yet another relevant development since this petition was filed, a New York state judge compelled the NFL to respond to discovery about what it knew regarding “the dangers of concussions” and whether it “deliberately concealed them from players.” See Belson, *Judge Tells N.F.L. to Reveal Some Secrets*, N.Y. Times, Oct. 31, 2016, <http://nyti.ms/2erukj0>. That issue is central to the strength of the underlying claims in this case, and yet this settlement was reached without even the most rudimentary discovery into what the NFL’s executives knew and when they knew it. If this Court does not grant certiorari, the answer will arrive too late for the thousands of former players the settlement seeks to bind.

**III. Because the settlement releases the future claims of thousands of absentees for nothing—without providing the requisite structural protections—it violates *Amchem* and *Ortiz*.**

On the merits, the respondents spend most of their time avoiding the question presented and the real reason this settlement runs afoul of *Amchem* and *Ortiz*. The NFL rewrites the question (at i) to focus on something else entirely: whether the settlement “satisfies Rule 23(e)’s requirement that a class-action settlement be ‘fair, reasonable, and adequate.’” But “a fairness hearing

under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule ‘designed to protect absentees.’” *Ortiz*, 527 U.S. at 849; *see id.* at 858 (“[T]he proponents of the settlement are trying to rewrite Rule 23; each ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense.”).

Taking a different tack, class counsel doggedly try to recast the question as a factual dispute. *See* CC BIO 2, 10, 11, 16, 18, 19, 20, 21. That is bewildering. Adequacy of representation and due process are *legal* questions. And the only facts that matter are uncontested—“the structure of the negotiations” and “the terms of the settlement” that it produced. *Amchem*, 521 U.S. at 627.

Start with the structure. If there is an original sin in this case, it is that much of the important early negotiations occurred without *any* structural protections to guard against intraclass conflicts. When class counsel first sat down at the negotiating table, they “sought to act on behalf of a single giant class rather than on behalf of discrete subclasses,” even though “the interests of those within the single class [were] not aligned.” *Id.* at 626. Those negotiations decided which injuries would be compensable and which would not, and thus who would benefit from the settlement and who would not. The winners were the 28.12% of class members who are expected to qualify for compensation according to class counsel’s own estimates; the losers were everyone else—71.88% of the class. A.1585.

Although class counsel now assert (at 21) that these facts are “invented out of whole cloth,” their own declarations say otherwise: Only “*after this structure was*

*agreed to*” were the subclasses created. A.3578 (“[A]fter this structure was agreed to, Arnold Levin was designated to represent the players in Subclass 1 who have not yet received a diagnosis of neuromuscular or neurocognitive impairment, and Dianne Nast was tasked with representing the players in Subclass 2 who have received a qualifying diagnosis.”). And logic doesn’t allow for any other possibility. Because the subclasses are defined by reference to whether a class member has a “qualifying injury” (a category that includes current but not future CTE claims), the definition of qualifying injury necessarily predated creation of the subclasses themselves.

That is no small thing. Class counsel concede (at 5) that negotiations over the compensable categories were “contentious,” and that, “[u]ltimately, the NFL was willing to compensate only objectively verifiable and serious neurocognitive and neuromuscular injuries, *i.e.*, dementia, Alzheimer’s Disease, Parkinson’s Disease, and ALS,” as well as current CTE claims. CC BIO 5. By contrast, “[t]he NFL would not agree to compensate less objectively verifiable and multifactorial conditions”—including many serious injuries that the plaintiffs themselves pleaded in the master complaint—or to compensate for future CTE claims. *Id.* at 5-6. But that just points up the structural problems. Although this kind of give-and-take raises no concerns in bilateral litigation, a settlement-only class action is different—particularly a conflicted one. It requires structural protection for the absentees whose rights are being resolved. And here, “the District Court took no steps at the outset to ensure that the potentially conflicting interests” of different class members “were protected by provisional certification of subclasses.” *Ortiz*, 527 U.S. at 831-32. Instead, by the time subclass counsel assumed their roles—having been selected by (and from) the steering committee, without court involvement—nobody was looking out for

the vast majority of class members whose claims had already been bargained away, including people who will one day be diagnosed with CTE and suffer immeasurably as a result.

To make matters worse, the subclasses were not “homogenous,” but included class members with “more valuable claims than” others. *Id.* at 856-57. And both counsel selected to represent the two subclasses also represented clients alleging similar injuries in cases already on file—and even represented the same client—while retaining a financial stake in their recoveries. *See* Pet. 12-13, 28.<sup>1</sup>

The substance of the deal confirms its inadequacy. As in *Amchem* and *Ortiz*, this settlement is a zero-sum game, entailing “essential allocation decisions designed to confine compensation and to limit defendants’ liability.” *Amchem*, 521 at 626-27. It does not account for changing science, no one can “opt out at the back end,” and future CTE claims are expressly “extinguished with no compensation,” while present CTE claims are valued at up to \$4 million. *Id.* The settlement also contains a clear-sailing clause for up to \$112.5 million in attorneys’ fees (though a fee motion has not yet been filed), plus a

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<sup>1</sup> Despite class counsel’s suggestions (at 15, 20), petitioners have never asserted that futures-subclass counsel represents clients with qualifying *diagnoses*. Petitioners have said only that he “represented nine players who alleged current *symptoms*”—many of the same symptoms alleged by clients of the other subclass counsel, with whom he “shared a client”—and that he “agreed to fees in these cases on a one-third contingency basis.” Pet. 12-13, 28. Class counsel never deny these facts. And petitioners’ arguments were presented to and passed on below, so there is no impediment to this Court’s review. Pet. App. 21a-31a.

-10-

5% set-aside that could be worth another \$46 million based on damages estimates.

Respondents do not deny any of these facts. And although they attempt to explain away the settlement's compensation for current CTE claims as just a "proxy" for other diseases (*see* NFL BIO 28), that argument withers under even the most modest scrutiny—much less the kind of "rigorous analysis" that Rule 23(a) requires, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011), and still less the "heightened" version applicable in the settlement context, *Amchem*, 521 U.S. at 620. According to the respondents' own estimates, the average payment for a CTE claim will be \$1.44 million, while the average payment for dementia claims will be \$190,000—almost eight times less. A.1573. Neither respondent even tries to defend this gaping disparity. Like the NFL, class counsel (at 25) characterize CTE compensation as simply an "accommodation" for those "whose deaths preceded the ability to get the medical proofs required under the settlement." But the settlement makes no similar accommodation for any class member who died before the settlement but was not inspected for CTE. The settlement's compensation for CTE is thus exactly what it purports to be—compensation for CTE.

A final point: Nobody contends that class counsel are anything other than skilled, well-intentioned lawyers who have achieved what they believe is a fair deal. But settlements can create skewed incentives, and the rules of the road are unclear. Nearly twenty years ago, this Court laid down guideposts, identifying the need for structural protections. But just what those protections must look like, and how far they extend, are questions that remain. This Court should answer them.

-11-

### CONCLUSION

The petition for a writ of certiorari should be granted.

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November 21, 2016



# Exhibit II



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JA7631

No. 16-413

Vide 16-283

Title: Raymond Armstrong, et al., Petitioners

v.

National Football League, et al.

Docketed: September 29, 2016

Linked with 16A186

Lower Ct: United States Court of Appeals for the Third Circuit

Case Nos.: (15-2272)

Decision Date: April 18, 2016

Rehearing  
June 1, 2016

Denied:

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Aug 18 2016 Application (16A186) to extend the time to file a petition for a writ of certiorari from August 30, 2016 to October 17, 2016, submitted to Justice Alito.

Aug 19 2016 Response to application from respondent Shawn Wooden, et al. filed.

Aug 22 2016 Application (16A186) granted by Justice Alito extending the time to file until September 19, 2016.

Sep 8 2016 Application (16A186) to extend further the time from September 19, 2016 to October 3, 2016, submitted to Justice Alito.

Sep 12 2016 Application (16A186) granted by Justice Alito extending the time to file until September 26, 2016. No further extensions will be granted for any reason.

Sep 26 2016 Petition for a writ of certiorari filed. (Response due October 31, 2016)

Oct 11 2016 Order extending time to file response to petition to and including November 2, 2016.

Oct 26 2016 Brief amicus curiae of Brain Injury Association of America filed.

Oct 27 2016 Order further extending time to file response to petition to and including November 7, 2016.

Oct 31 2016 Brief amici curiae of 135 Former National Football League Players filed.

Oct 31 2016 Brief amicus curiae of Public Citizen, Inc. filed.

Nov 4 2016 Brief of respondents The National Football League and NFL Properties, LLC in opposition filed. VIDED.

Nov 4 2016 Brief of respondents Turner, et al. in opposition filed. VIDED.

Nov 21 2016 DISTRIBUTED for Conference of December 9, 2016.

Nov 21 2016 Reply of petitioners Raymond Armstrong, et al. filed. (Distributed)

Nov 22 2016 Supplemental brief of respondents Turner, et al. filed. VIDED. (Distributed)

Dec 12 2016 Petition DENIED.

JA7632

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March 31, 2017 | Version 2014.2

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## Supreme Court of the United States

JA7634

# Exhibit JJ

## **AN UPDATED ANALYSIS OF THE NFL CONCUSSION SETTLEMENT**

**Prepared by:**  
**Thomas Vasquez Ph.D.**  
**Ankura Consulting Group**  
**April 10, 2017**

I was originally asked by Co-Lead Class Counsel in *In re National Football League Players' Concussion Injury Litigation*, MDL No. 2323 (E.D. Pa.) to undertake an analysis to assist in settlement negotiations in mid-2013. My conclusions from that work are reflected in the NFL Concussion Liability Forecast, dated February 10, 2014, which is attached hereto as Exhibit 1.

Thereafter, Co-Lead Class Counsel asked me to prepare a Declaration and to elaborate on certain elements of the work I had conducted for my initial report. A discussion of those analyses is contained in my Declaration, dated November 12, 2014, which is attached hereto as Exhibit 2.<sup>1</sup>

Now, I have been asked by Co-Lead Class Counsel to value the Settlement, as implemented, *i.e.*, to update my prior analyses to take into consideration subsequent changes to the initial settlement agreement and additional data now known concerning Class Member participation rates.

Specifically, with regard to my current analysis, I understand that the original settlement that I analyzed was revised such that the \$675 million cap on the Monetary Award Fund (MAF) was removed in the revised settlement, dated June 25, 2014, with the NFL Parties agreeing to pay all valid claims for the 65-year life of the MAF.<sup>2</sup> I further understand that on February 2, 2015, the Court issued an Order suggesting five changes to the revised settlement, which changes were endorsed by the parties and reflected in the Class Action Settlement Agreement (As Amended), filed on February 13, 2015, which received final approval by the Court on April 22, 2015 (the Settlement).

The potential impact of three of the five changes to the Settlement are capable of being valued:<sup>3</sup>

1. Providing Eligible Season credit for play in World League of American Football, the NFL Europe League and the NFL Europa League (NFL Europe);
2. Assuring that all living Retired NFL Football Players who timely register for the Settlement, who are eligible to participate in the Baseline Assessment Program (BAP), and who timely seek a BAP Examination, will receive a BAP Examination, despite the \$75 million funding cap on the BAP; and

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<sup>1</sup> Exhibit B to my November 12, 2014 Declaration is my NFL Concussion Liability Forecast, dated February 10, 2014, which is Exhibit 1 hereto. It is not reproduced a second time.

<sup>2</sup> I was aware of the uncapping of the MAF as of the date of my November 12, 2014 Declaration, but that fact did not affect my conclusions.

<sup>3</sup> I am not able to value the last two changes to the Settlement, because attempting to value those changes, namely, providing a waiver of the \$1,000 appeal fee for Class Members demonstrating financial hardship and allowing a reasonable accommodation for Class Members who do not possess medical records in support of a Qualifying Diagnosis due to *force majeure* type events, would be speculative.



3. Including the Qualifying Diagnosis of “Death with CTE” for those Retired NFL Football Players who died between the dates of preliminary approval (July 7, 2014) and final approval (April 22, 2015).

This report addresses the value of the Settlement in its entirety based upon the above three changes and the actual registration data that the Claims Administrator now possesses, which data have been provided to me through April 3, 2017.

Table 1 provides a summary of the value of the settlement as originally estimated and as modified to reflect: (1) additional information on the participation rate of former players and (2) the three changes to the settlement.

**Table 1**

**Current Estimated Value of the NFL Settlement: After Inclusion of Updated Information and Changes in the Settlement Agreement**

| Estimate                                | (\$ Millions)             |                                   |           |
|-----------------------------------------|---------------------------|-----------------------------------|-----------|
|                                         | Monetary Award Fund (MAF) | Baseline Assessment Program (BAP) | Total     |
| ● Original Estimates (2014)             |                           |                                   |           |
| Nominal Awards                          | \$933.4                   | \$75.0                            | \$1,008.4 |
| Nominal Funding                         | \$675.0                   | \$75.0                            | \$750.0   |
| Effect of Increased Participation Rates |                           |                                   |           |
| Change                                  |                           |                                   |           |
| Nominal Awards                          | \$56.9                    | \$0.0                             | \$56.9    |
| Nominal Funding                         | \$41.1                    | \$0.0                             | \$41.1    |
| Updated Estimates                       |                           |                                   |           |
| Nominal Awards                          | \$990.3                   | \$75.0                            | \$1,065.3 |
| Nominal Funding                         | \$716.1                   | \$75.0                            | \$791.1   |
| Effect of Changes to the Settlement     |                           |                                   |           |
| Change                                  |                           |                                   |           |
| Nominal Awards                          | \$45.8                    | \$0.0                             | \$45.8    |
| Nominal Funding                         | \$33.2                    | \$0.0                             | \$33.2    |
| Current Estimate                        |                           |                                   |           |
| Nominal Awards                          | \$1,036.1                 | \$75.0                            | \$1,111.1 |
| Nominal Funding                         | \$749.3                   | \$75.0                            | \$824.3   |

Note: Unlike MAF awards that continue for 60+ years, payments under the BAP are mostly limited to 10 years (15 years for Supplemental Awards). Thus for this purpose, Nominal Awards under the BAP are set equal to Nominal Funding.

The current estimate of the value of the settlement is approximately \$103 million or 10% higher than the Nominal Award amounts I estimated in 2014 (approximately \$74 million or 10% higher Nominal Funding). Approximately 55% of the increase is due to slightly higher participation rates now anticipated vs. originally projected (63% vs. 59%). The participation rate through April 3<sup>rd</sup> is 51.5%, which projects to an anticipated participation rate as of the close of registrations of approximately 63%—four percent greater than originally projected. The remaining 45% of the

increase in Nominal Award amounts is due to the changes to the settlement.

The remainder of my report includes a brief overview of the methodology used to estimate the value of the settlement and provides detail on the impact of each change since my 2014 report.

### *Methodology*

The methodology used in this analysis (and used in my original analysis in 2014) is based on a life cycle forecasting model. The life cycle model looks at each individual in the population of former NFL players and “ages” them year-by-year into the future.

During the aging process, the life cycle model takes each of the former NFL players individually and first applies the epidemiological risk equations to compute the probability of contracting each one of the compensable injuries. The model then applies overall mortality rates to compute the likelihood of death due to other natural causes<sup>4</sup>. The mortality rates used to compute the likelihood of death due to natural causes are those for all causes for males in the same age group.

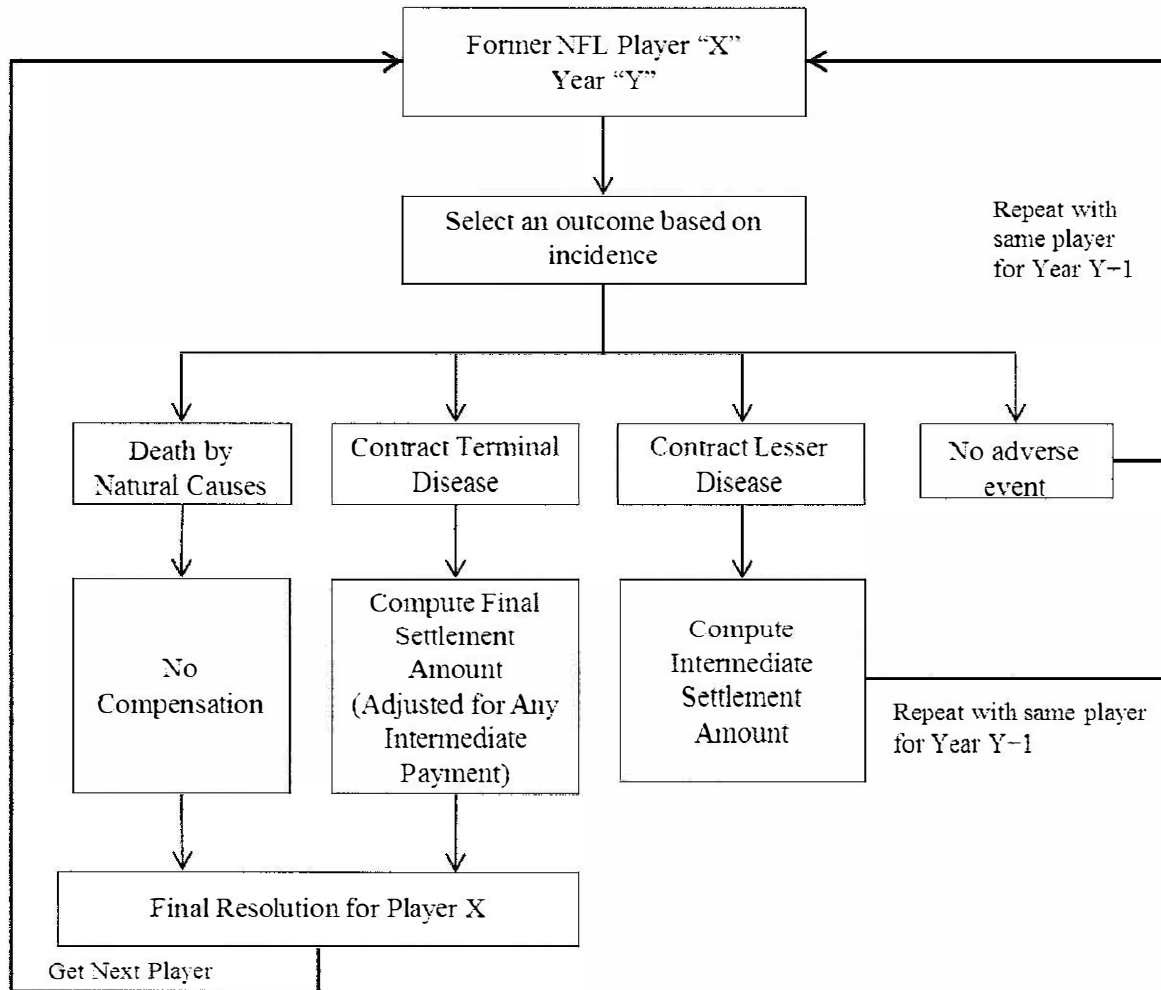
Thus, for each player and for each year, computations are made based on the probabilities of each of the following: (1) the player will die of natural causes, (2) he will be diagnosed with one of the compensable terminal diseases (Alzheimer’s, ALS, Parkinson’s), (3) he will be diagnosed with one of the non-terminal neurocognitive disorders (Level 1.5 or 2), and (4) he will not experience any of these adverse conditions during that year.

These steps are repeated year-by-year, changing the mortality rates and disease incidence rates accordingly for age until the individual player reaches a final resolution – either he dies of natural causes or he is diagnosed with one of the terminal diseases and receives full final compensation. The model then repeats this entire process for the next player until all players in the population have reached the final resolution stage, and the last member of the population of former NFL players is no longer alive.

A diagram of the life cycle modeling methodology is shown in Figure 1.

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<sup>4</sup> The term “natural causes” refers to any cause of death that is not identified as a compensable disease in the Settlement Agreement.

**Figure 1: Life Cycle Methodology Overview***Updated Information*

The only additional information available since my 2014 analysis relates to the participation rate of former players. The 2014 report assumed that 59.3% of the eligible former players would participate in the settlement. Current information on player registrations indicates that the participation rate may be close to 63%. Generally, the registration of potential class members starts at a high level and very quickly declines. As seen on Table 2, this holds for the registration pattern in the NFL settlement.

**Table 2**  
**Player Registrations by Week: First Eight Weeks of Registration**

| Week of Registration | Registrations  |                |        | Percent of Eligible Players |            |
|----------------------|----------------|----------------|--------|-----------------------------|------------|
|                      | Retired Player | Representative | Total  | Within Week                 | Cumulative |
| 1st Week             | 4,321          | 126            | 4,447  | 20.5%                       | 20.5%      |
| 2nd Week             | 2,185          | 56             | 2,241  | 10.3%                       | 30.9%      |
| 3rd Week             | 1,074          | 59             | 1,133  | 5.2%                        | 36.1%      |
| 4th Week             | 459            | 26             | 485    | 2.2%                        | 38.4%      |
| 5th Week             | 809            | 52             | 861    | 4.0%                        | 42.3%      |
| 6th Week             | 749            | 35             | 784    | 3.6%                        | 46.0%      |
| 7th Week             | 608            | 42             | 650    | 3.0%                        | 49.0%      |
| 8th Week             | 513            | 42             | 555    | 2.6%                        | 51.5%      |
| Total Registrations  | 10,718         | 438            | 11,156 | 51.5%                       | na         |

Note: Approximately 21,700 eligible players (20,200 former US players plus 1,500 former European League players)

After the first two weeks, registrations fell dramatically to 5.2% of eligible players in the third week and continued to fall to a low in the eighth week of 2.6% of eligible players. I believe that if the registration pattern follows the first eight week trend that the final participation rate will be approximately 63%.

This increase in participation rate above the 59% estimated in 2014 increases the Nominal Awards by approximately \$56.9 million or approximately 5.5% (increased Nominal Funding of \$41.1 million).

*Providing Eligible Season credit for play in World League of American Football, the NFL Europe League and the NFL Europa League (NFL Europe)*

There are two distinct groups of players that may be affected by the inclusion of seasons played in one of the European leagues – those individuals that played in both the U.S. and European leagues and those that played solely in European leagues. The first group may have an increase in their eligible seasons and a resulting increase in compensation from the Monetary Award Fund (MAF). The second group includes newly eligible players who may benefit from compensation from the MAF as well as the Baseline Assessment Program (BAP).

Table 3 shows the number of former NFL Europe players by whether they also played in the NFL US. Throughout the 15 years of operation of the various European leagues, 3,613 individuals played in NFL Europe<sup>5</sup>. Of these, 2,321 (64.2%) played in both Europe and the US.

The additional seasons are calculated as follows:

- Each NFL Europe season is equal to 0.5 NFL US seasons
- All duplicate years are eliminated for individuals that recorded the same years of play in NFL Europe (some players played for different teams in the same year and thus the season was recorded twice)
- All duplicate years are eliminated for individuals that played in both NFL Europe and NFL US (some individuals played in both leagues in the same year)
- Eligible Seasons are limited to five years for each player

**Table 3**

**Former NFL Europe Players, By US Playing Status**

| NFL Europe Player Category    | Players      |               | Additional Eligible Seasons |
|-------------------------------|--------------|---------------|-----------------------------|
|                               | Count        | Percent       |                             |
| Played Only in Europe         | 1,261        | 34.9%         | 1,021                       |
| Played in Europe and the U.S. | 2,321        | 64.2%         | 1,152                       |
| Unknown                       | 31           | 0.9%          | 25                          |
| <b>Total</b>                  | <b>3,613</b> | <b>100.0%</b> | <b>2,198</b>                |

Note: Additional Eligible Seasons computed at 0.5 US seasons per NFL Europe Seasons; and eligible seasons limited to five.

The calculation of additional MAF payments was made by adding the additional seasons to each affected player and recalculating the MAF award. This was done for each affected player and added to a total across all affected players. The increased nominal MAF awards for already eligible players (players who also played in the US) is approximately \$21 million (\$15 million increase in nominal funding). The increased nominal MAF awards for newly eligible players (players who played solely in Europe) is estimated to be approximately \$20 million (\$15 million increase in nominal funding).

<sup>5</sup> Source: [www.footballdb.com/nfl-europe/nfleplayers](http://www.footballdb.com/nfl-europe/nfleplayers)



*Assuring that all living Retired NFL Football Players who timely register for the Settlement, who are eligible to participate in the Baseline Assessment Program (BAP), and who timely seek a BAP Examination, will receive a BAP Examination, despite the \$75 million funding cap on the BAP*

The BAP Administrator estimates that it will cost \$7.5 million to administer the BAP program. My original analysis assumed that baseline exams would cost approximately \$41.3 million (based on an estimate that approximately 60% of former players register for the program at a cost of \$3,500 per exam). Under the \$75 million cap, approximately \$26.3 million remained available for Supplemental Benefits, as such are determined and set under the BAP Program.

The increase in participation rates and the eligibility of European players is expected to increase the number of baseline exams, and their attendant costs. However, any such increased cost is still well-within the \$75 million provisioned in the BAP Program for such exams. Thus, absent a circumstance where the combination of BAP exams and Supplemental Benefits exhausts the \$75 million cap (and the NFL parties will be required to fund a BAP Examination beyond the cap), the total value of the settlement is unaffected. At present, and given the mechanism through which Supplemental Benefits are fixed under the Settlement, such an occurrence is speculative.

*Including the Qualifying Diagnosis of "Death with CTE" for those Retired NFL Football Players who died between the dates of preliminary approval (July 7, 2014) and final approval (April 22, 2015).*

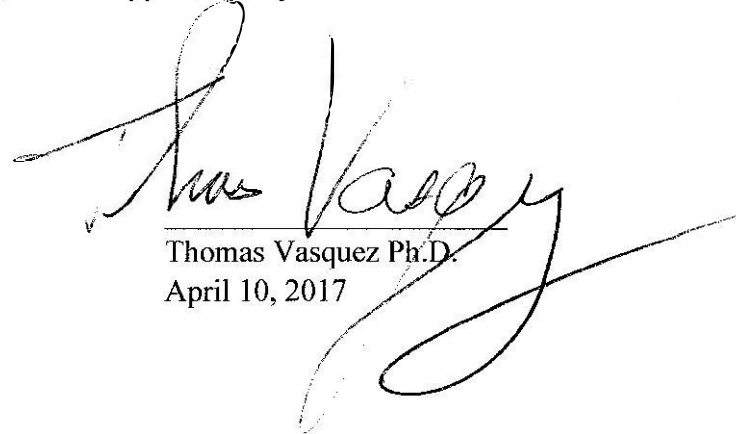
It is difficult to precisely estimate the additional payments to players who died and were diagnosed post-mortem with CTE during this period of time. Indeed, the authors of available studies of former players concerning CTE admit bias in the cases examined (only players with observed symptoms were studied). However, the reports of post-mortem pathological diagnoses of CTE in former players in recent years provide relevant data for the purpose of approximating potential additional claims.

Among the 424 former players who died between 2010 and 2012, 32 or 7.55% reportedly had post-mortem pathological diagnoses characteristic of CTE. I rely on these results to estimate the additional eligible Death with CTE claims for period from July 7, 2014 through April 22, 2015. During this period 111 former players died. Using the 7.55% that held during the 2010 to 2012 period, the representatives of approximately 8 additional former players would be eligible for the "Death with CTE" payment.<sup>6</sup>

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<sup>6</sup> It is important to note that, as described in the relevant CTE literature, these 8 players are likely to have suffered from one of the other Qualifying Diagnoses in the Settlement prior to death, and thus may have been eligible for compensation for those earlier Qualifying Diagnoses (at younger ages, and thus at greater age-related award levels) independent of the later diagnosis for CTE. My analysis does not account for any such earlier Qualifying Diagnoses; rather, it treats each of the July 2014 – April 2015 Death with CTE cases as "new" qualifying claims. In that regard, my analysis overstates the financial impact of this change to the Settlement Agreement, and is thus conservative.

On the basis of age, Eligible Seasons, and other offsets, using the life cycle model discussed above, the value of the change of the date to April 22, 2015 is approximately \$5 million in the aggregate.

  
Thomas Vasquez Ph.D.  
April 10, 2017

# Exhibit 1



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## **NFL Concussion Liability Forecast**

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**Prepared by:**  
**Thomas Vasquez Ph.D.**  
**Analysis Research Planning Corporation**  
**February 10, 2014**

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## Table of Contents

|                                                                         |    |
|-------------------------------------------------------------------------|----|
| 1. Introduction.....                                                    | 3  |
| 2. Summary of Conclusions .....                                         | 3  |
| 3. Methodology .....                                                    | 10 |
| 4. Database of Former Players, Living and Deceased .....                | 13 |
| Database of Former Players .....                                        | 13 |
| Profile of Former NFL Players – Age and Eligible Seasons Played.....    | 15 |
| 5. Incidence of Compensable Diseases .....                              | 17 |
| Background Incidence .....                                              | 18 |
| Induced Incidence .....                                                 | 19 |
| Total Incidence.....                                                    | 19 |
| Total Incidence by Disease .....                                        | 20 |
| 6. Compensation .....                                                   | 26 |
| Compensation of Living Former Players .....                             | 26 |
| Examples of Monetary Award Calculations .....                           | 30 |
| 7. Cost Estimate .....                                                  | 33 |
| Appendix A: Determination of Incidence Rates .....                      | 39 |
| Appendix B: Annual Cash Flow Model and Assumptions .....                | 48 |
| Appendix C: Summary of Claims Filed by Former NFL Players.....          | 50 |
| Appendix D: Examples of Life Cycle Modeling of Former NFL Players ..... | 51 |
| Appendix E: List of Deceased Former NFL Players with CTE.....           | 66 |
| Appendix F: CV of Thomas Vasquez Ph.D. ....                             | 67 |

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## 1. Introduction

On January 31, 2012, a federal multidistrict litigation was established in the United States District Court for the Eastern District of Pennsylvania, In re: National Football League Players' Concussion Injury Litigation, (MDL No. 2323). Additional similar lawsuits were also filed and are pending in various state and federal courts.

I was asked by representatives of the Plaintiff's Executive Committee in that litigation to undertake an analysis to assist in the settlement negotiations. My analysis is designed to determine the total cost of resolving all pending and future claims by former National Football League (NFL) players alleging brain injury caused by concussive and sub-concussive impacts (concussion-related injuries). I was also asked to determine whether the agreed upon settlement amount and timing of payments is sufficient to meet all the obligations arising from these claims.

This report presents the methodology and conclusions from my analysis.

## 2. Summary of Conclusions

As of the beginning of the 2013/2014 NFL season there were approximately 21,000 individuals who are former NFL players – approximately 19,400 who are still alive and 1,700 who are deceased.<sup>1</sup> Pursuant to the terms of the Settlement Agreement, upon approval of the settlement, all of these individuals will be eligible for payment following registration and submission of appropriate evidence of a qualifying diagnosis of a concussion-related injury and related claims information.

My primary conclusions are:

- 1.) Approximately 3,600 of the former players are estimated to develop compensable injuries and participate in the settlement with total compensation of approximately \$950 million. Because many of the injuries take years to develop, the compensation stream extends far into the future. Indeed, only approximately 54% of total compensation will be paid in the first 20 years of the operation of the settlement fund.
- 2.) The agreed upon level of funding (taking into account the earnings on the funds, the payout stream and the compensation scheme) is sufficient to pay all of the anticipated

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<sup>1</sup> An estimated 3,300 former players have died since 1984. The Settlement Agreement, however, presumptively limits eligibility for monetary awards to the Representative Claimants of players who died on or after January 1, 2006. Approximately 800 deceased former players are eligible under this limitation. However, the analysis includes 900 players deceased from 2000 through 2005 based on a provision in the Settlement Agreement concerning statutes of limitation. The analysis of the former players who died from 2000 to 2005 is different from that concerning the former players who died after 2005, as explained herein.

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concussion-related claims. I understand that the funding for the Monetary Award Fund (MAF) totals \$675 million<sup>2</sup> to be paid over the next 20 years.

My conclusions are based on: (1) a compilation of the number of former players (both still alive and deceased) that are eligible to be class members which includes detailed information on their demographics, current compensable injury (if any) and NFL playing experience; (2) an in depth review of the medical literature and health statistics related to concussion-related injuries; (3) the application of a life cycle forecasting model that follows each individual player over time (applying epidemiological probabilities each year of the player's remaining life, the model determines whether and if so, when a player contracts a compensable injury), and; (4) estimates of the probability that the former players elect to participate in the settlement.

Certain estimates and assumptions are critical in forming my opinion. The following is a summary of the analysis supporting my two basic conclusions.

*Total Compensable Claims and Compensation*

Table 2-1 provides a summary of estimated compensable claims and total compensation by type of injury based on the compensable injuries defined in the Settlement Agreement.

Approximately 3,600 former players will receive payment. The overwhelming majority, approximately 15,000, are not compensated because they never contract a compensable disease. The remaining 2,300 do contract a compensable disease but based on evidence from other mass tort settlements, it is estimated that these eligible class members never elect to participate.

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<sup>2</sup> The total settlement is \$750 million. However, \$75 million is earmarked for the Baseline Assessment Program (BAP), leaving \$675 million to pay compensation to class members.

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**Table 2-1**  
**Former Players with Compensable Concussion-Related Injury**  
**by Type of Injury with Total Compensation**  
**(\$ millions)**

| Most Serious Injury/ Disease | Total Claims |         | Total Compensation |         |
|------------------------------|--------------|---------|--------------------|---------|
|                              | Count        | Percent | Amount             | Percent |
| Compensable Injury/Disease   |              |         |                    |         |
| ALS                          | 18           | 0.5%    | \$49.4             | 5.3%    |
| Death w/CTE                  | 46           | 1.3%    | \$64.9             | 7.0%    |
| Parkinson's                  | 14           | 0.4%    | \$3.2              | 0.3%    |
| Alzheimer's                  | 1,757        | 48.9%   | \$474.9            | 50.9%   |
| Level 2                      | 1,761        | 49.0%   | \$341.0            | 36.5%   |
| Level 1.5                    | na           | na      | na                 | na      |
| Total, Compensable           | 3,596        | 100.0%  | \$933.4            | 100.0%  |
| Not Compensated              | 17,474       | na      | na                 | na      |
| Grand Total                  | 21,070       | na      | \$933.4            | 100.0%  |

Note: All compensation categorized by most serious injury. All Level 1.5 claims are assumed to progress to Level 2 and more serious levels. \$248 million is paid to former players at Level 1.5. This amount is included in the category of their most serious disease as follows: \$212 million paid at Level 2; \$34 million to Alzheimer's and \$2 million to other disease types. Players are not compensated because they did not experience a compensable injury or did not file a claim.

The overwhelming percent of compensable claims and compensation is paid to former players with Alzheimer's disease or Level 2 neurocognitive disorders – 98% of compensable claims and 87% of compensation. The distribution of claims reflects the relative probabilities of the occurrence of the various diseases in the general population combined with the additional incidence related to concussions.

#### *Timing of Compensation Payments and Funding*

Table 2-2 shows the timing of payments to former players and the receipt of funding by the settlement fund through the payment of the last compensable claim. The timing and total amount of funding are sufficient to pay all claims.

- Compensation payments in the first five years are high because there are a relatively large number of former NFL players who have already indicated they intend to file a claim. These claimants include former players who have already been diagnosed with a

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compensable injury and will be paid in the first few years of the settlement fund. After these claims are resolved, the fund will be receiving and paying claims at a significantly lower rate, as the filing of future claims depends on the timing of the manifestation of future compensable injuries;

- The initial funding amount of approximately \$364 million (55% of the total funding) is designed to provide enough assets to pay the compensable claims already identified and to cover the startup costs of the claim processing facility while still leaving a significant asset. The remaining assets are supplemented with an additional \$311 million which is paid in annual installments through 2033. At that time, the remaining assets of the settlement fund (with earnings) are sufficient to pay all remaining claims.
- The Fund Balance increases through 2034 as the additional funding and earnings exceed the required amount to pay claims. The fund balance begins to decline after that as the settlement fund continues to pay claims, but with earnings as its only source of revenue - there is no additional funding contributed after 2033. The last claim is paid in the early 2080s at which time the fund is estimated to have a balance of approximately \$80 million.<sup>3</sup>

**Table 2-2**  
**Settlement Fund Compensation Payments, Funding and Earnings**  
**Through the Payment of the Last Compensable Claim**  
**(\$ millions)**

| Time Period        | Compensation<br>Amount <sup>1</sup> | Funding | Earnings | End of Period<br>Fund<br>Balance |
|--------------------|-------------------------------------|---------|----------|----------------------------------|
| 2014 through 2018  | \$292.3                             | \$364.0 | \$25.0   | \$91.6                           |
| 2019 through 2023  | \$78.2                              | \$103.7 | \$28.1   | \$143.8                          |
| 2024 through 2028  | \$95.5                              | \$103.7 | \$38.6   | \$189.0                          |
| 2029 through 2038  | \$178.6                             | \$103.7 | \$103.2  | \$214.0                          |
| 2039 through 2048  | \$167.7                             | \$0.0   | \$72.9   | \$116.2                          |
| Remaining 35 Years | \$133.3                             | \$0.0   | \$103.4  | \$80.4                           |
| Total              | \$945.5                             | \$675.0 | \$371.2  | na                               |

<sup>1</sup>Includes processing Costs

Note: Funding plus earnings is actually slightly in excess of the amount needed to pay all claims.

<sup>3</sup> The \$80 million balance in the early 2080s implies overfunding of only approximately \$5 million at 2014 levels.

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*The Effect of Age, Years Played in the NFL and Inflation on Settlement Amounts*

The Settlement Agreement provides maximum monetary awards to players who are less than 45 years old when they are diagnosed with a compensable disease and have played in the NFL for 5 years or more. There is a reduction in the compensation levels based on age and years played beginning with players age 45 or older and players with less than 5 years of experience in the NFL. The Settlement Agreement also provides for an escalation in the compensation amounts to adjust for inflation. These adjustments have a significant effect on the average amount of compensation paid to the former players and a corresponding significant effect on the total compensation paid by the fund.

The magnitude of the effect of age, playing time and inflation depends heavily on the average age of the players when contracting a compensable disease, the number of years the individual played in the NFL and the year the disease is contracted. Table 2-3 summarizes these variables.

The table shows that the average age for former players today is approximately 51 years of age and the average age at the time of diagnosis with the most serious disease is approximately 77 years of age for both groups. Of course, 77 years of age is simply an average. It is expected that many former players will develop compensable injuries at a much younger age. Due to the average age at the time of onset of the disease, compensation amounts are subject to significant reductions from the maximum awards.

Table 2-3 also shows that 60% of all players estimated to receive compensation have fewer than the 5 years needed to receive the maximum monetary award. It also shows that individuals who have already filed a claim have significantly more playing time than individuals who have not yet filed.<sup>4</sup>

- First, only 35% of the players who have already filed played fewer than 5 years. However, 73% of the players who have not yet filed played fewer than 5 years.
- In addition, those who have already filed played an average of 6.3 years. Those who have not yet filed played an average of only 3.5 years.

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<sup>4</sup> Throughout the report, a player is labeled a filer if he is currently represented by an attorney and has provided an indication the he will participate in the class. It does not necessarily mean the player has filed a law suit.

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**Table 2-3**  
**Selected Characteristics of Former Players:**  
**Age, Years Played and Year of Contracting Disease/Injury**

| Player Category | Age At:          |                             | Years Played                                     |                      | Year of Most Serious Injury |
|-----------------|------------------|-----------------------------|--------------------------------------------------|----------------------|-----------------------------|
|                 | 2014 or at Death | Year of Most Serious Injury | Percent of Players with Less Than 5 Years Played | Average Years Played |                             |
| Already Filed   | 52.0             | 76.3                        | 35%                                              | 6.3                  | 2037                        |
| Future Filer    | 51.2             | 77.7                        | 73%                                              | 3.5                  | 2039                        |
| All Filers      | 51.4             | 77.4                        | 60%                                              | 4.4                  | 2039                        |

Table 2-4 shows the effect of these adjustments for age and years played. Without any adjustments, players would be compensated at the maximum value for their injury – shown in the table as the Maximum Monetary Award.

**Table 2-4**  
**Effect of Age, Years Played and Inflation on Average and Total Compensation**  
**by Injury Category**

| Most Serious Injury/ Disease | Maximum Monetary Award | Value After Age Adjustment |                                  | Value After Age and Years Played Adjustment |                                  | Actual Final Value |                                  |
|------------------------------|------------------------|----------------------------|----------------------------------|---------------------------------------------|----------------------------------|--------------------|----------------------------------|
|                              |                        | Average Payment            | Total Compensation (\$ millions) | Average Payment                             | Total Compensation (\$ millions) | Average Payment    | Total Compensation (\$ millions) |
| Compensable Injury/Disease   |                        |                            |                                  |                                             |                                  |                    |                                  |
| ALS                          | \$5,000,000            | \$2,930,000                | \$52.8                           | \$2,120,000                                 | \$38.1                           | \$2,740,000        | \$49.4                           |
| Death w/CTE                  | \$4,000,000            | \$1,910,000                | \$85.8                           | \$1,440,000                                 | \$64.9                           | \$1,440,000        | \$64.9                           |
| Parkinson's                  | \$3,500,000            | \$320,000                  | \$4.5                            | \$190,000                                   | \$2.7                            | \$230,000          | \$3.2                            |
| Alzheimer's                  | \$3,500,000            | \$340,000                  | \$593.8                          | \$190,000                                   | \$340.7                          | \$270,000          | \$474.9                          |
| Level 2                      | \$3,000,000            | \$210,000                  | \$368.8                          | \$140,000                                   | \$246.5                          | \$190,000          | \$341.0                          |
| Level 1.5                    | \$1,500,000            | na                         | na                               | na                                          | na                               | na                 | na                               |
| Total, Compensable           | na                     | na                         | \$1,105.7                        | na                                          | \$693.0                          | na                 | \$933.4                          |

Note: All Level 1.5 are assumed to progress to Level 2. All compensation categorized by most serious injury

Adjusting for age at diagnosis reduces the average compensation significantly below the maximum monetary award levels. The impact varies across injury types. For example, the average payment for diagnosed cases of ALS is \$2.93 million rather than the maximum award amount of \$5 million - a 40% reduction. The average age-adjusted payment for players being diagnosed with Alzheimer's is \$0.34 million, about 90% less than the maximum award amount of \$3.5 million.



Adjusting for years played has a less substantial effect on award values after the age adjustment. For example as Table 2-4 shows, for former players diagnosed with ALS the average payment after the adjustment for number of years played is \$2.1 million – a 28% reduction. The average payment to players diagnosed with Alzheimer’s disease is reduced from \$0.34 million to \$0.19 million.

Finally, adjusting for inflation increases average and total compensation. Again, as Table 2-4 shows, adjusting for inflation increases average payments by approximately 30% for ALS and 40% for Alzheimer’s, 20% for Parkinson’s, no change for death with CTE and approximately 40% for Level 2 neurocognitive disorders. However, the actual final average award amounts for each disease are significantly below the maximum monetary award amounts, resulting in an inflation adjusted total compensation amount of \$933.4 million.

#### *Player Participation Rates*

The participation rate in the Settlement Agreement among eligible former NFL players is a significant factor in determining the number of claims that will be filed and thus also the amount of funds required to resolve the claims.

In order to establish an estimate of the participation rate, several factors were considered. First, experience with participation rates in other mass tort cases was reviewed. In general, participation rates in mass torts are dependent on the outreach and notice program, the lag from exposure/injury to the manifestation of a compensable disease/injury, and award size. For comparison, the participation rates for various large and widely publicized class action settlements and data on consumer product recall response rates were considered. The participation rates varied considerably, but centered in a range of 20% to 30%.

In this case, approximately 4,200 former players had already retained counsel and indicated a desire to participate at the time this analysis was prepared, which represents more than 20% of the potentially eligible population of approximately 21,100 former players.<sup>5</sup> I understand that there has been for some time and continues to be extensive outreach to former players by plaintiff lawyers and others to participate. Whether continuing further efforts are likely to attract a significant number of additional players is not certain.

Nonetheless, it is assumed that the participation rates in this settlement will achieve high levels because the settlement has very high public visibility, and contact information available through the NFL Players union and other sources that can be used in the notification process is available for a large portion of the potentially eligible population. My forecast of the number of future claims and the resulting cash requirements to fund the settlement assumes that 50% of the living

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<sup>5</sup> Additional claims have been filed since this analysis was performed.

and deceased<sup>6</sup> former NFL players that have not yet filed will ultimately participate. When combined with those who have already filed, it is assumed that approximately 60% of all potentially eligible former players will participate in the settlement.

### *Inflation of Compensation Awards and the Earnings Rate of Settlement Assets*

A key assumption in determining whether the settlement is adequately funded is the real rate of return earned on settlement assets. The calculations assume a 2.5% real rate of return – a 4.5% nominal yield and an underlying 2.0% inflation rate. The actual expected return is dependent on the real returns available for different types of assets and the portfolio mix adopted by the settlement administrators.

Long term historical experience suggests that a real rate of return of 2.5% is at the extreme lower level of expected returns. Returns on debt and equity both exceed 2.5% real rate of return over long periods of time. Indeed, even an extremely high reliance on low risk financial assets historically has yielded more than 2.5% annually. However, because of historically low bond yields in recent years, I conservatively assumed a 2.5% return.

Recent experience supports an average annual inflation rate of approximately 2.0% (especially since the Settlement Agreement caps the annual increase at 2.5%, thereby limiting the impact of any short term aberration). It should be noted that the adequacy of the settlement funds depends on the real rate of return, not the absolute level of the two components.

## **3. Methodology**

The methodology used in this analysis is based on a life cycle forecasting model. The life cycle model looks at each individual in the population of former NFL players and “ages” them year-by-year into the future.

During the aging process, the life cycle model takes each of the former NFL players individually and first applies the epidemiological risk equations to compute the probability of contracting each one of the compensable injuries. The model then applies overall mortality rates to compute the likelihood of death due to other natural causes<sup>7</sup>. The mortality rates used to compute the likelihood of death due to natural causes are those for all causes for males in the same age group.

Thus, for each player and for each year, computations are made based on the probabilities of each of the following: (1) the player will die of natural causes, (2) he will be diagnosed with one of the compensable terminal diseases (Alzheimer’s, ALS, Parkinson’s, Death with CTE), (3) he

<sup>6</sup> The participation rate for former players who were deceased before 2006 was reduced to 20%. This is because the settlement requires that pre-2006 deceased players must satisfy local statute of limitation conditions related to wrongful death claims and such requirement will preclude eligibility for most of these claims.

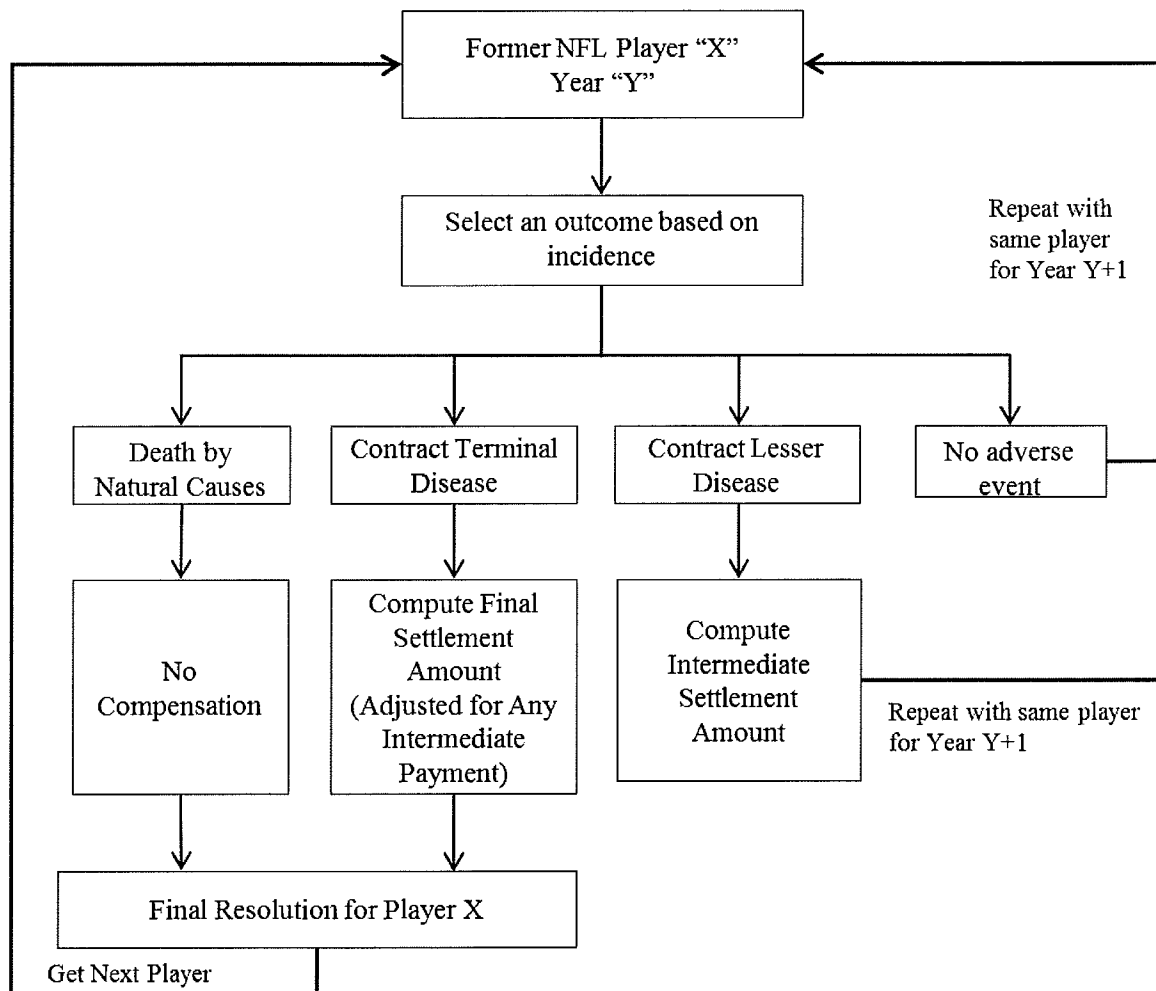
<sup>7</sup> The term “natural causes” used throughout this report refers to any cause of death that is not identified as a compensable disease in the Settlement Agreement.

will be diagnosed with one of the non-terminal neurocognitive disorders (Level 1.5 or 2), and (4) he will not experience any of these adverse conditions during that year.

These steps are repeated year-by-year, changing the mortality rates and disease incidence rates accordingly for age until the individual player reaches a final resolution – either he dies of natural causes or he is diagnosed with one of the terminal diseases and receives full final compensation. The model then repeats this entire process for the next player until all players in the population have reached the final resolution stage, and the last member of the population of former NFL players is no longer alive.

A diagram of the life cycle modeling methodology is shown in Table 3-1.

**Table 3-1: Life Cycle Methodology Overview**



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As the diagram shows, there are two possibilities for reaching a final resolution with a player: (1) when the model predicts that a player dies of natural causes he is removed from the eligible population either without compensation or with compensation for a non-terminal disease, or (2) when the model predicts that a player is diagnosed with one of the terminal diseases, a computation is made of the settlement amount due to him based on the disease, his age and the number of playing years. When the model predicts that a player is diagnosed with a neurocognitive disorder, he is assigned a Level 2 diagnosis. In every case where Level 2 is diagnosed, it is assumed that the player initially presented with a Level 1.5 disorder three years earlier. A computation is made of the settlement amount due to him based on condition, age and playing years as he progresses from Level 1.5 to Level 2, and that player is run through the model again repeatedly until his date and cause of death or terminal disease are determined with compensation calculated accordingly over time.

Once a player has been determined by the model to be diagnosed with a disease that is eligible for compensation, the computation of the settlement amount is made based on the compensation matrix. This matrix identifies a maximum value of compensation for each disease diagnosis, and then makes adjustments for certain factors that take into account background incidence and risk exposure such as the player's age at the time of the diagnosis and the number of years he played in the NFL.

There are 1,712 deceased former NFL players who may be eligible for compensation. This includes 76 players who have filed claims that include a qualifying diagnosis, and 1,636 non-filers who died between 2000 and 2013. In this analysis, for claims already filed that provided a qualifying diagnosis, this information was used to determine the amount of compensation due.

Deceased players for which no claim was filed but whose survivors are potentially eligible for compensation and deceased players who filed a claim but included no diagnosis information were also run through the life cycle forecasting model retrospectively in order to determine the likely date of diagnosis if any for a compensable disease. In order to forecast compensation that may be paid to these deceased players, the analysis does the following: (1) retains those cases in which death occurred between 2000 and 2013, (2) applies the same background and induced incidence rates used for eligible living former players to the deceased players retrospectively based on their age to determine a diagnosis date of a terminal or lesser disease, (3) applies the age discount (based on the estimated age at diagnosis) and the discount for years played, and (4) applies estimated participation rates.<sup>8</sup>

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<sup>8</sup> The participation rates for deceased players who have not filed a claim is the same as that used for eligible living players who have not filed (50%) based on the assumption that living family members or the player's estate may file a representative claim. For deceased players in this category who died prior to 2006, it is assumed that 20% of those who participate will be able to successfully demonstrate to the Claims Administrator that their claims are not time barred under the applicable statute of limitations, and thus establish their eligibility for compensation. For deceased claimants who have filed a claim and were diagnosed with a compensable disease the participation rate is 100%. For deceased claimants who did not provide a diagnosis, the participation rate is assumed to be 95%.

The total compensation amount for all eligible former NFL players is determined by summing the compensation amounts for each player year-by-year.

The key inputs to the model are:

- Player data including age and years played in the NFL
- Background incidence for each of the compensable diseases
- Induced incidence from concussions for each of the compensable diseases
- Compensation amounts for each disease with adjustments for age and years played

Player data was derived from a combination of several authoritative sources. The sources, data, and methods used to identify the population of players who are potentially eligible for compensation are described in detail in section 4 of this report.

The incidence rates for each of the compensable diseases are determined by combining the background incidence rate for each disease with the induced incidence rate for each disease from concussion-related injuries. Because the compensable diseases have been the subject of numerous epidemiological studies, there is a reasonable amount of research available to effectively determine incidence rates by age. An extensive review of the available literature and research was conducted as part of this analysis to determine the incidence of each disease by age.

There is far less quantitative data available concerning the induced incidence of these diseases caused by concussive injuries. A review of the available research in this area, particularly with respect to football-related injuries and concussions, was undertaken. However, it was still necessary to make some assumptions regarding induced incidence rates.

The sources of data and assumptions that have been applied in the life cycle model to determine incidence rates are described in further detail in section 5 and Appendix A of this report.

The compensation amounts used in the analysis for each disease are based on the compensation matrix in the Settlement Agreement. These compensation amounts include adjustments for age at the date of diagnosis to account for background incidence and for years played in the NFL to account for risk exposure. A further description of the compensation amounts and the adjustment factors is presented in section 6 of this report.

#### **4. Database of Former Players, Living and Deceased**

##### **Database of Former Players**

An essential input for the analysis is a comprehensive database of information about the population of former NFL players who are eligible for the settlement. In this case extensive historical data are available from a variety of authoritative sources, and it has been possible to combine different databases to compile the relevant information for the entire population of

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former NFL players, including those still living and those that are deceased. The population of former NFL players was identified by combining information from four primary sources: (1) the database of NFL players who had already filed claims during the pre-settlement period,<sup>9</sup> (2) the NFL player database owned and maintained by STATS, Inc.,<sup>10</sup> (3) a database of former players provided by the NFL, and (4) a database of practice/development squad players also provided by the NFL. These four databases were merged, duplicate records were removed, and additional research and analysis was done to update deficient player records to produce the most complete list of former NFL players possible.

This analysis identified a total of 21,070 former NFL players who may be eligible for compensation. As shown in Table 4-1, this included 19,434 players who are currently alive or are deceased but have filed a claim, and 1,636 players who died between the years 2000 to 2013 but have not filed a claim.

**Table 4-1**  
**Former Players Potentially Eligible for Compensation**

| <b>Source</b>                                     | <b>Count</b> |
|---------------------------------------------------|--------------|
| Living                                            |              |
| Database of players who filed claims <sup>1</sup> | 4,207        |
| NFL Database                                      | 13,340       |
| STATS Database                                    | 1,349        |
| NFL Practice/Development Squad Database           | 538          |
| Subtotal                                          | 19,434       |
| Deceased, 2000-2013                               | 1,636        |
| Grand Total                                       | 21,070       |

<sup>1</sup> This count includes 76 former NFL players who are deceased that have filed a claim.

In this analysis it has been assumed that former players, who were deceased in the period from 2000 to 2013, including those with a diagnosis of CTE, are eligible for compensation. Former

<sup>9</sup> Since this analysis was completed additional claims have been filed by former NFL players and their representatives and claims continue to be filed. These players are included in the population used in the analysis and do not affect the outcome.

<sup>10</sup> STATS Inc. is a service provider to the NFL that collects and maintains game and player statistics. STATS, Inc. is considered one of the leading sources of historical, current and real-time sports data and statistics.

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players who died prior to 2006 are not eligible under the Settlement Agreement absent a separate determination of eligibility.

The STATS and NFL databases include more data items than were needed for this analysis. The analysis makes use of variables such as age, date of birth, date of death, number of years played, and specific years played.

In merging the databases from the different sources, a number of issues were encountered:

- In the database of claims already filed, 206 of the records did not match to the NFL or STATS databases. Among these 40% provided no playing history. However, based on further research playing history was found for 17%. For 80% of the 206 cases, reference to the player's football experience was found through online sources. None of the unmatched cases were removed from the database.
- There were a total of 3,700 players included in the NFL database but not in the STATS database. Of these, 40% were practice players. Nearly all of the non-practice players had fewer than 2 seasons playing experience.
- Merging the three databases indicates that there may be an additional 1,349 eligible living inactive players. However, this count may be an overstatement for two reasons: (1) some STATS players may be deceased, but have no recorded date of death and, (2) some STATS players may be currently employed by the NFL.

There were also a number of issues encountered with respect to the deceased players in the databases. The STATS database included information for 5,930 deceased players dating as far back as 1925. The NFL database included only 1,617 deceased former players but it covered a shorter historical period. The NFL database contains player records only since 1980 while the STATS database includes some 2,286 records for players deceased prior to 1980. In the more recent period beginning in 2000, the STATS database includes 1,515 deceased player records compared to 981 in the NFL database. Merging, matching and de-duplicating the NFL, STATS and filed claims data sets identified a total of 1,636 non-filing deceased players who died in the period from 2000 to 2013.

#### **Profile of Former NFL Players – Age and Eligible Seasons Played**

The analysis examines the entire life cycle of each living former NFL player in the population in order to determine whether he will die of natural causes or be diagnosed with a compensable disease and when that will happen. Importantly, as discussed elsewhere in this report, the amount of any monetary award is highly dependent on the age of a player when he is diagnosed with a compensable disease and on the number of years he played in the NFL.

Table 4-2 below shows the current age profile of former players grouped into different categories – all players, non-filing players that are currently living, players that have already filed claims, and players that are deceased and no claim has been filed on their behalf. As this table shows,



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the average age of all players is 50.5 years, and 36% of all players are currently aged 55 or older. For those who are 55 or older, the age discount reduces the maximum award amount by approximately two-thirds (except in the rare cases of ALS).

**Table 4-2**  
**Profile of Former NFL Players by Age**

| Age         | All Players |         | Living/Not Yet Filed |         | Already Filed |         | Deceased/Not Yet Filed |         |
|-------------|-------------|---------|----------------------|---------|---------------|---------|------------------------|---------|
|             | Count       | Percent | Count                | Percent | Count         | Percent | Count                  | Percent |
| Under 45    | 8,354       | 40%     | 6,744                | 44%     | 1,502         | 36%     | 108                    | 7%      |
| 45 - 49     | 2,368       | 11%     | 1,831                | 12%     | 487           | 12%     | 50                     | 3%      |
| 50 - 54     | 2,802       | 13%     | 2,095                | 14%     | 657           | 16%     | 50                     | 3%      |
| 55 - 59     | 1,794       | 9%      | 1,261                | 8%      | 458           | 11%     | 75                     | 5%      |
| 60 - 64     | 1,514       | 7%      | 1,026                | 7%      | 371           | 9%      | 117                    | 7%      |
| 65 - 69     | 1,291       | 6%      | 824                  | 5%      | 330           | 8%      | 137                    | 8%      |
| 70 - 74     | 1,007       | 5%      | 604                  | 4%      | 220           | 5%      | 183                    | 11%     |
| 75 - 79     | 769         | 4%      | 419                  | 3%      | 129           | 3%      | 221                    | 14%     |
| 80+         | 1,171       | 6%      | 423                  | 3%      | 53            | 1%      | 695                    | 42%     |
| Total       | 21,070      | 100%    | 15,227               | 100%    | 4,207         | 100%    | 1,636                  | 100%    |
| Average Age | 50.5        |         | 47.9                 |         | 51.0          |         | 73.3                   |         |

Table 4-3 below shows the profile of former players based on the number of years played in the NFL,<sup>11</sup> also grouped into the four different categories: all players, players who have not yet filed and are currently living, players that have already filed claims, and players that are deceased and no claim has been filed on their behalf. As this table shows, the average number of years played for all players is 4.1 years and 48% of all players played less than 3 years. For those who played less than 3 years, the years played discount reduces the maximum award amounts by 50% to 90%. The average number of years played for the 15,227 currently living players who have not yet filed was 3.4 years, which would result in a years-played discount of 40% on average from the maximum award amounts.

<sup>11</sup> The Settlement Agreement uses the concept of “eligible season” in determining whether to apply any discount. In the Settlement Agreement, an “eligible season” is a season in which the player was on the active roster for 3 or more regular season or postseason games, or on the practice squad roster for 8 or more games. The databases of former NFL players generally identified the calendar years that a player played. The analysis performed herein uses calendar years as the basis for determining the number of eligible seasons and therefore may overestimate the number of eligible seasons played.



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**Table 4-3**  
**Profile of Former NFL Players by Years Played**

| Years Played <sup>1</sup> | All Players |         | Living/Not Yet Filed |         | Already Filed |         | Deceased/Not Yet Filed |         |
|---------------------------|-------------|---------|----------------------|---------|---------------|---------|------------------------|---------|
|                           | Count       | Percent | Count                | Percent | Count         | Percent | Count                  | Percent |
| <1                        | 2,247       | 11%     | 2,200                | 14%     | 39            | 1%      | 8                      | 0%      |
| 1                         | 5,041       | 24%     | 4,287                | 28%     | 238           | 6%      | 516                    | 32%     |
| 2                         | 2,719       | 13%     | 2,198                | 14%     | 321           | 8%      | 200                    | 12%     |
| 3                         | 1,940       | 9%      | 1,407                | 9%      | 392           | 9%      | 141                    | 9%      |
| 4                         | 1,564       | 7%      | 946                  | 6%      | 476           | 11%     | 142                    | 9%      |
| 5                         | 1,366       | 6%      | 804                  | 5%      | 443           | 11%     | 119                    | 7%      |
| 6                         | 1,232       | 6%      | 650                  | 4%      | 477           | 11%     | 105                    | 6%      |
| 7                         | 965         | 5%      | 519                  | 3%      | 357           | 8%      | 89                     | 5%      |
| 8                         | 889         | 4%      | 475                  | 3%      | 340           | 8%      | 74                     | 5%      |
| 9                         | 802         | 4%      | 452                  | 3%      | 289           | 7%      | 61                     | 4%      |
| 10                        | 679         | 3%      | 361                  | 2%      | 271           | 6%      | 47                     | 3%      |
| >10                       | 1,626       | 8%      | 928                  | 6%      | 564           | 13%     | 134                    | 8%      |
| Total                     | 21,070      | 100%    | 15,227               | 100%    | 4,207         | 100%    | 1,636                  | 100%    |
| Average Years Played      | 4.1         |         | 3.4                  |         | 6.3           |         | 4.3                    |         |

<sup>1</sup>Players who played an additional 0.5 years are included in the higher years played figure, e.g., a player who played 3.5 years is reported here as having played 4 years.

## 5. Incidence of Compensable Diseases

In order to forecast the timing and amount of monetary compensation that will be required to resolve the claims of former NFL players it is necessary to determine the incidence of compensable diseases for the population of former players over the lifetime of that population. This involves two steps:

- Determining the background incidence of the compensable diseases in the population. The background incidence represents the rate at which these diseases are expected to arise naturally in the population, including former NFL players.
- Determining the additional incidence of the compensable diseases that will arise in the population of former NFL players due to concussions – referred to as induced incidence or risk multiplier.

### *Compensable Injuries*

The Settlement Agreement identifies 6 diagnostic categories as the compensable diseases:

- ALS

- Death with CTE<sup>12</sup>
- Parkinson's
- Alzheimer's
- Level 2 Neurocognitive Impairment<sup>13</sup>
- Level 1.5 Neurocognitive Impairment

For each of these diseases extensive review of the medical and scientific literature was performed to estimate the background and induced incidence rates.

The following sections describe the approach used to determine the background incidence, induced incidence and total incidence estimated for the population of former NFL players.

### Background Incidence

To determine background incidence, this analysis has relied upon the best available published literature and research. A detailed description of the sources and methods used to determine background incidence is provided in Appendix A. The most severe diseases, referred to as terminal diseases, are defined in the Diagnostic and Statistical Manual -V (DSM-5) and the World Health Organization's International Classification of Diseases (9<sup>th</sup> and 10<sup>th</sup> editions) (ICD-9 and ICD-10). Because there has generally been extensive research and study of these diseases, information on background incidence rates (or prevalence rates) is reasonably available. As described in Appendix A, in order to arrive at a consistent measure and application of incidence rates, certain methods and assumptions were made including:

- Converting Prevalence to Incidence – in cases where only prevalence data were available, prevalence was converted to incidence.
- Extrapolating data for older age groups to younger ages – in cases where data were available only for specific older populations (*e.g.*, over age 65), the incidence was extrapolated to younger ages by defining the rate for 20-year-olds as 1/100<sup>th</sup> of the rate for 65-year-olds and increasing the rate through this age range by fitting an exponential curve.
- Exponential smoothing of data aggregated by age ranges – for diseases where data were provided only by age ranges, the incidence rate was assigned to the midpoint of the age range and extrapolated to each age by fitting an exponential curve.
- Adjustment for history of stroke – because Alzheimer's and neurocognitive disorders are sometimes attributed to a prior history of stroke, the incidence of these diseases was adjusted to account for this joint causality. According to epidemiological research, 9.1%

<sup>12</sup> Under the terms of the Settlement Agreement, only pre-settlement diagnoses of Death with CTE are eligible for compensation. Accordingly, the analysis does not forecast future cases of Death with CTE, and there is no corresponding induced incidence prospectively. Also, this analysis used confirmed cases of CTE.

<sup>13</sup> Estimates of the incidence of Level 1.5 and Level 2 neurocognitive disorders were based on incidence for dementia as described in the methodology section of this report.

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of Alzheimer's patients and 8.4% of dementia patients had a history of stroke prior to the onset of these diseases. Since compensation to claimants who have a prior stroke history will be discounted by 75%, the overall incidence of Alzheimer's and dementia was adjusted to account for this instead of forecasting them separately. The incidence of Alzheimer's and dementia were reduced by an amount equal to 75% of the number of cases with joint causality (*i.e.*, 25% of those with a prior history of stroke are included in the background incidence).

- Adjustment for Traumatic Brain Injury (TBI) – The Settlement Agreement provides a 75 percent discount to monetary award amounts in cases where there has been a prior incident of TBI for all disease categories except ALS. This analysis did not assume any adjustments for prior incidence of TBI. Therefore to the extent that such cases occur, the analysis will tend to overestimate the total cost of monetary awards.

### **Induced Incidence**

Research and literature concerning the potential increased incidence for the compensable diseases is limited, and some of it has historically been controversial. In this analysis peer-reviewed literature has been given priority, and controversial studies have been excluded. Studies of comparable sports injuries have also been relied upon. However, it was still necessary to develop and apply assumptions concerning the induced risk effect of concussions among former NFL players.

For Alzheimer's disease, Parkinson's and dementia, a risk multiple of 2.0 for ages 20 through 60 was used. After age 60, the risk multiple was assumed, based on available literature, to be more additive than multiplicative, and so the adjusted induced incidence is calculated as the background incidence at those ages, plus the incremental difference between the incidence rates at age 60 for each of the diseases. For ALS, a similar methodology was applied for the various ages, but using a multiplier for ages 20-60 of 1.4.

A detailed description of the sources and methods used to determine background incidence is provided in Appendix A.

### **Total Incidence**

For each of the compensable diseases, the background incidence and induced incidence were combined to yield the total incidence among former NFL players. A summary of the incidence and counts of players for each compensable disease for the most serious injury/disease type is shown in Table 5-1 below. In cases where players contracted more than one type of injury, only the most serious injury is included here (*i.e.*, no double counting).

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**Table 5-1**  
**Estimated Total Incidence by Injury/Disease Type for Former NFL Players**

| <b>Most Serious Injury/<br/>Disease Type</b> | <b>Total Incidence - Background and Induced</b> |                |
|----------------------------------------------|-------------------------------------------------|----------------|
|                                              | <b>Count</b>                                    | <b>%</b>       |
| ALS                                          | 31                                              | 0.15%          |
| Death w/CTE                                  | 46                                              | 0.22%          |
| Parkinson's                                  | 24                                              | 0.11%          |
| Alzheimer's                                  | 2,946                                           | 13.98%         |
| Level 2                                      | 2,878                                           | 13.66%         |
| Level 1.5                                    | 0                                               | 0.00%          |
| Deceased, No Disease                         | 15,145                                          | 71.88%         |
| <b>Total</b>                                 | <b>21,070</b>                                   | <b>100.00%</b> |

Note: All Level 1.5 are assumed to progress to Level 2, therefore the incidence count is the same for both impairment levels

As the table shows, taking into account both background and induced incidence, approximately 72% of the total population of former NFL players will die of natural causes unrelated to one of the compensable diseases. Of the 28% who it is estimated will be diagnosed with a compensable disease, 49% (2,878) will be diagnosed with Level 2 neurocognitive disorder as their most severe compensable disease. It is estimated that 3,047 former NFL players will be diagnosed with one of the severe terminal diseases – about 97% of those being diagnosed with Alzheimer's.

#### **Total Incidence by Disease**

To determine how the incidence of each of the compensable diseases will affect the cash flow requirements for claim resolution it is critical to know how many cases will be diagnosed each year and then to compute the discounts that would be applied to the compensation amount for the players' age and number of years played in the NFL. The life cycle forecasting model estimates this for each player and each year. The following tables summarize the incidence and provide averages of players' ages and years played for each disease. For each of these tables, the columns represent the following:

- Year of Diagnosis – the period of years for which the incidence data have been summarized.

- Players Still Living – count of players who are alive at the beginning of the period. Over the course of each period, the count of players is reduced by the number who are deceased by any cause.
- Number Diagnosed – the number of players who will be diagnosed with that particular disease during the period (prior to application of participation rates).
- Percent Diagnosed – the percent of players still living at the beginning of the period who are diagnosed with the disease during the period.
- Average Age – the average age of the players who are diagnosed with the disease during the period.
- Average Years Played – the average number of years played in the NFL by the players diagnosed with the disease during the period.

Players may be diagnosed with more than one compensable injury/disease over time. For example, a former player may qualify for Level 2.0 and then contract Alzheimer's later in life. Most of the counts shown in the tables of this report include only the most severe compensable disease that a player contracts in his lifetime. In the example above, the player is counted only as contracting Alzheimer's in Table 5-1 even though he had a prior diagnosis of Level 2.0. However, compensation is paid at the time each disease is contracted. If the player is first diagnosed with a neurocognitive disorder and is then later diagnosed with an even more serious disease, he is paid at the time of the initial diagnosis and then he is paid again at the time of the more serious disease diagnosis. The second payment for the more serious disease diagnosis is a net amount that recognizes he had already received some compensation for his injuries.

Tables 5-2 through 5-7 show the incidence of all injuries. The same player discussed above who was only counted as having contracted Alzheimer's, will be counted twice in the examples below – once as he is eligible for Level 2.0 and again when he contracts Alzheimer's. This potential double counting means that the disease counts in Tables 5-2 through 5-7 exceed the counts in Table 5-1 and other tables in the report that count only the most serious injury.

Table 5-2 shows the estimated incidence of ALS by multi-year periods and a profile of the average ages and years played for players diagnosed with this disease. As this table shows, there will be an estimated 36 cases of ALS among former NFL players who have an average age of 60 and played an average of 4.3 years.

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**Table 5-2**  
**Total Incidence and Profile for ALS, by Year**

| <b>Year of<br/>Diagnosis</b> | <b>Players Still<br/>Living</b> | <b>Number<br/>Diagnosed</b> | <b>Percent<br/>Diagnosed</b> | <b>Average<br/>Age</b> | <b>Average Years<br/>Played</b> |
|------------------------------|---------------------------------|-----------------------------|------------------------------|------------------------|---------------------------------|
| <2006                        | 21,070                          | 6                           | 0.03%                        | 48.0                   | 3.7                             |
| 2006 - 2010                  | 20,343                          | 4                           | 0.02%                        | 50.8                   | 8.3                             |
| 2011 - 2020                  | 19,699                          | 3                           | 0.02%                        | 56.7                   | 2.0                             |
| 2021 - 2030                  | 17,595                          | 6                           | 0.03%                        | 48.8                   | 5.6                             |
| 2031 - 2040                  | 14,501                          | 6                           | 0.04%                        | 62.7                   | 3.3                             |
| 2041 - 2050                  | 10,635                          | 4                           | 0.04%                        | 69.8                   | 2.4                             |
| 2051 - 2060                  | 6,632                           | 5                           | 0.08%                        | 77.2                   | 5.3                             |
| 2061 - 2070                  | 3,114                           | 2                           | 0.06%                        | 82.5                   | 2.3                             |
| 2071 - 2080                  | 850                             | 0                           | 0.00%                        | -                      | -                               |
| 2081 +                       | 67                              | 0                           | 0.00%                        | -                      | -                               |
| <b>Total</b>                 |                                 | <b>36</b>                   | <b>0.17%</b>                 | <b>60.0</b>            | <b>4.3</b>                      |

Table 5-3 shows the estimated incidence of Death with CTE and a profile of the average ages and years played for players diagnosed with this disease. In the case of Death with CTE, this analysis assumes that only those cases that had a confirmed diagnosis pre-settlement will be compensated. Therefore the model does not forecast any futures cases of CTE. As the table shows, there are 46 cases of Death with CTE among former NFL players who have an average age of 60.3 and have played an average of 7.9 years.

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**Table 5-3**  
**Total Incidence and Profile for Death with CTE, by Year**

| <u>Year of<br/>Diagnosis</u> | <u>Players Still<br/>Living</u> | <u>Number<br/>Diagnosed</u> | <u>Percent<br/>Diagnosed</u> | <u>Average<br/>Age</u> | <u>Average Years<br/>Played</u> |
|------------------------------|---------------------------------|-----------------------------|------------------------------|------------------------|---------------------------------|
| <2006                        | 21,070                          | 3                           | 0.00%                        | 44.0                   | 11.3                            |
| 2006 - 2010                  | 20,343                          | 18                          | 0.00%                        | 57.7                   | 7.3                             |
| 2011 - 2020                  | 19,699                          | 25                          | 0.00%                        | 64.1                   | 8.0                             |
| 2021 - 2030                  | 17,595                          | 0                           | 0.00%                        | -                      | -                               |
| 2031 - 2040                  | 14,501                          | 0                           | 0.00%                        | -                      | -                               |
| 2041 - 2050                  | 10,635                          | 0                           | 0.00%                        | -                      | -                               |
| 2051 - 2060                  | 6,632                           | 0                           | 0.00%                        | -                      | -                               |
| 2061 - 2070                  | 3,114                           | 0                           | 0.00%                        | -                      | -                               |
| 2071 - 2080                  | 850                             | 0                           | 0.00%                        | -                      | -                               |
| 2081 +                       | 67                              | 0                           | 0.00%                        | -                      | -                               |
| Total                        |                                 | 46                          | 0.00%                        | 60.3                   | 7.9                             |

Note: This analysis assumes that only those cases that had a confirmed diagnosis pre-settlement will be compensated. Therefore, no future cases of Death with CTE have been forecast for compensation.

Table 5-4 shows the estimated incidence of Parkinson's by multi-year periods and a profile of the average ages and years played for players diagnosed with this disease. As this table shows, there will be an estimated 25 cases of Parkinson's among former NFL players who have an average age of 75.5 and played an average of 4.9 years.

**Table 5-4**  
**Total Incidence and Profile for Parkinson's, by Year**

| <u>Year of<br/>Diagnosis</u> | <u>Players Still<br/>Living</u> | <u>Number<br/>Diagnosed</u> | <u>Percent<br/>Diagnosed</u> | <u>Average<br/>Age</u> | <u>Average Years<br/>Played</u> |
|------------------------------|---------------------------------|-----------------------------|------------------------------|------------------------|---------------------------------|
| <2006                        | 21,070                          | 1                           | 0.00%                        | 56.0                   | 10.0                            |
| 2006 - 2010                  | 20,343                          | 2                           | 0.01%                        | 78.5                   | 6.0                             |
| 2011 - 2020                  | 19,699                          | 4                           | 0.02%                        | 81.5                   | 5.5                             |
| 2021 - 2030                  | 17,595                          | 6                           | 0.03%                        | 71.3                   | 5.3                             |
| 2031 - 2040                  | 14,501                          | 3                           | 0.02%                        | 72.0                   | 7.0                             |
| 2041 - 2050                  | 10,635                          | 4                           | 0.04%                        | 80.3                   | 3.9                             |
| 2051 - 2060                  | 6,632                           | 3                           | 0.05%                        | 72.7                   | 2.7                             |
| 2061 - 2070                  | 3,114                           | 2                           | 0.06%                        | 83.0                   | 1.3                             |
| 2071 - 2080                  | 850                             | 0                           | 0.00%                        | -                      | -                               |
| 2081 +                       | 67                              | 0                           | 0.00%                        | -                      | -                               |
| Total                        |                                 | 25                          | 0.12%                        | 75.5                   | 4.9                             |

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Table 5-5 shows the estimated incidence of Alzheimer's by multi-year periods and a profile of the average ages and years played for players diagnosed with this disease. As this table shows, there will be an estimated 2,949 cases of Alzheimer's among former NFL players who have an average age of 77.9 and played an average of 4.1 years.

**Table 5-5**  
**Total Incidence and Profile for Alzheimer's, by Year**

| <b>Year of<br/>Diagnosis</b> | <b>Players Still<br/>Living</b> | <b>Number<br/>Diagnosed</b> | <b>Percent<br/>Diagnosed</b> | <b>Average<br/>Age</b> | <b>Average Years<br/>Played</b> |
|------------------------------|---------------------------------|-----------------------------|------------------------------|------------------------|---------------------------------|
| <2006                        | 21,070                          | 163                         | 0.77%                        | 73.6                   | 3.7                             |
| 2006 - 2010                  | 20,343                          | 48                          | 0.24%                        | 76.8                   | 3.8                             |
| 2011 - 2020                  | 19,699                          | 314                         | 1.59%                        | 72.7                   | 5.0                             |
| 2021 - 2030                  | 17,595                          | 431                         | 2.45%                        | 72.2                   | 4.6                             |
| 2031 - 2040                  | 14,501                          | 562                         | 3.88%                        | 75.9                   | 4.3                             |
| 2041 - 2050                  | 10,635                          | 556                         | 5.23%                        | 79.0                   | 4.3                             |
| 2051 - 2060                  | 6,632                           | 479                         | 7.22%                        | 82.1                   | 3.9                             |
| 2061 - 2070                  | 3,114                           | 296                         | 9.51%                        | 84.8                   | 3.1                             |
| 2071 - 2080                  | 850                             | 94                          | 11.06%                       | 90.1                   | 2.1                             |
| 2081 +                       | 67                              | 6                           | 8.96%                        | 95.7                   | 1.3                             |
| <b>Total</b>                 |                                 | <b>2,949</b>                | <b>14.00%</b>                | <b>77.9</b>            | <b>4.1</b>                      |

Table 5-6 shows the estimated incidence of Level 2 neurocognitive disorders by multi-year periods and a profile of the average ages and years played for players diagnosed with this disease. As this table shows, there will be an estimated 3,354 cases of Level 2 disorders diagnosed among former NFL players who have an average age of 77.2 and played an average of 4.2 years. The incidence of neurocognitive disorders was estimated using data for the incidence of dementia as a proxy for Level 2 disorders. It was also further assumed that Level 2 disorders are progressive and every case would initially be diagnosed as a Level 1.5 disorder. In this analysis, incidence of dementia were treated as Level 2 disorders and then regressed backward by 3 years to determine the onset of the Level 1.5 disorder. The result of this can be seen in Table 5-7 where the number of diagnosed cases of Level 1.5 disorders is the same 3,354 as for Level 2.0, but the average age is 3 years younger at 74.2.



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**Table 5-6**  
**Total Incidence and Profile for Level 2, by Year**

| <b>Year of<br/>Diagnosis</b> | <b>Players Still<br/>Living</b> | <b>Number<br/>Diagnosed</b> | <b>Percent<br/>Diagnosed</b> | <b>Average<br/>Age</b> | <b>Average Years<br/>Played</b> |
|------------------------------|---------------------------------|-----------------------------|------------------------------|------------------------|---------------------------------|
| <2006                        | 21,070                          | 206                         | 0.98%                        | 74.5                   | 3.5                             |
| 2006 - 2010                  | 20,343                          | 71                          | 0.35%                        | 67.4                   | 5.7                             |
| 2011 - 2020                  | 19,699                          | 334                         | 1.70%                        | 73.6                   | 5.2                             |
| 2021 - 2030                  | 17,595                          | 541                         | 3.07%                        | 75.2                   | 4.9                             |
| 2031 - 2040                  | 14,501                          | 615                         | 4.24%                        | 75.3                   | 4.3                             |
| 2041 - 2050                  | 10,635                          | 648                         | 6.09%                        | 77.5                   | 4.0                             |
| 2051 - 2060                  | 6,632                           | 537                         | 8.10%                        | 80.1                   | 4.1                             |
| 2061 - 2070                  | 3,114                           | 325                         | 10.44%                       | 83.9                   | 2.9                             |
| 2071 - 2080                  | 850                             | 72                          | 8.47%                        | 88.3                   | 1.9                             |
| 2081 +                       | 67                              | 5                           | 7.46%                        | 95.8                   | 1.4                             |
| <b>Total</b>                 |                                 | 3,354                       | 15.92%                       | 77.2                   | 4.2                             |

**Table 5-7**  
**Total Incidence and Profile for Level 1.5, by Year**

| <b>Year of<br/>Diagnosis</b> | <b>Players Still<br/>Living</b> | <b>Number<br/>Diagnosed</b> | <b>Percent<br/>Diagnosed</b> | <b>Average<br/>Age</b> | <b>Average Years<br/>Played</b> |
|------------------------------|---------------------------------|-----------------------------|------------------------------|------------------------|---------------------------------|
| <2006                        | 21,070                          | 237                         | 1.12%                        | 70.7                   | 3.8                             |
| 2006 - 2010                  | 20,343                          | 71                          | 0.35%                        | 61.4                   | 6.2                             |
| 2011 - 2020                  | 19,699                          | 452                         | 2.29%                        | 71.9                   | 5.0                             |
| 2021 - 2030                  | 17,595                          | 571                         | 3.25%                        | 72.3                   | 4.8                             |
| 2031 - 2040                  | 14,501                          | 631                         | 4.35%                        | 72.7                   | 4.3                             |
| 2041 - 2050                  | 10,635                          | 638                         | 6.00%                        | 75.2                   | 4.0                             |
| 2051 - 2060                  | 6,632                           | 486                         | 7.33%                        | 78.2                   | 3.7                             |
| 2061 - 2070                  | 3,114                           | 230                         | 7.39%                        | 82.4                   | 2.7                             |
| 2071 - 2080                  | 850                             | 38                          | 4.47%                        | 87.2                   | 1.4                             |
| 2081 +                       | 67                              | 0                           | 0.00%                        | -                      | -                               |
| <b>Total</b>                 |                                 | 3,354                       | 15.92%                       | 74.2                   | 4.2                             |

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## 6. Compensation

### Compensation of Living Former Players

The compensation amounts used in the analysis are found in Exhibit 3 to the Settlement Agreement. This Monetary Award Grid (Grid) is shown in Table 6-1 below. The Grid defines maximum amounts to be paid to former players based upon their diagnoses. These maximum amounts are then subject to adjustments based on two discount factors: (1) the player's age at the time of diagnosis, and (2) the number of years played in the NFL. These adjustment factors were considered appropriate to account for background incidence and exposure risk.

Players who are diagnosed with a compensable disease before the age of 45, and played in the NFL for 5 or more years are eligible for the maximum compensation amounts. Adjustments are made for each year above the age of 45, and there is a further reduction to the compensation amount for each half year of playing time less than 5 years.

Table 6-1 below shows the maximum amounts to be paid under the compensation matrix for each disease category at different age ranges.<sup>14</sup>

**Table 6-1**  
**Monetary Award Grid, by Age at Time of Qualifying Diagnosis**

| Age Group | ALS         | Death w/CTE | Parkinson's | Alzheimer's | Level 2     | Level 1.5   |
|-----------|-------------|-------------|-------------|-------------|-------------|-------------|
| Under 45  | \$5,000,000 | \$4,000,000 | \$3,500,000 | \$3,500,000 | \$3,000,000 | \$1,500,000 |
| 45 - 49   | \$4,500,000 | \$3,200,000 | \$2,470,000 | \$2,300,000 | \$1,900,000 | \$950,000   |
| 50 - 54   | \$4,000,000 | \$2,300,000 | \$1,900,000 | \$1,600,000 | \$1,200,000 | \$600,000   |
| 55 - 59   | \$3,500,000 | \$1,400,000 | \$1,300,000 | \$1,150,000 | \$950,000   | \$475,000   |
| 60 - 64   | \$3,000,000 | \$1,200,000 | \$1,000,000 | \$950,000   | \$580,000   | \$290,000   |
| 65 - 69   | \$2,500,000 | \$980,000   | \$760,000   | \$620,000   | \$380,000   | \$190,000   |
| 70 - 74   | \$1,750,000 | \$600,000   | \$475,000   | \$380,000   | \$210,000   | \$105,000   |
| 75 - 79   | \$1,000,000 | \$160,000   | \$145,000   | \$130,000   | \$80,000    | \$40,000    |
| 80+       | \$300,000   | \$50,000    | \$50,000    | \$50,000    | \$50,000    | \$25,000    |

Table 6-2 below shows the percentage discount applied to the compensation amounts based on the number of years played. This ranges from a zero percent discount for 5 or more playing

<sup>14</sup> Table 6-1 shows average amounts over five year ranges. The actual award grid provides different amounts for each age from 45 to 80.

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years up to a 90 percent reduction in the payment amount for those who played 0.5 years or less.<sup>15</sup>

**Table 6-2**  
**Discounts to Monetary Awards for Years Played in the NFL**

| Years Played | Discount | All Players |         |
|--------------|----------|-------------|---------|
|              |          | Count       | Percent |
| 5+           | 0%       | 7,496       | 36%     |
| 4.5          | 10%      | 62          | 0%      |
| 4.0          | 20%      | 1,449       | 7%      |
| 3.5          | 30%      | 115         | 1%      |
| 3.0          | 40%      | 1,719       | 8%      |
| 2.5          | 50%      | 221         | 1%      |
| 2.0          | 60%      | 2,209       | 10%     |
| 1.5          | 70%      | 511         | 2%      |
| 1.0          | 80%      | 5,041       | 24%     |
| 0.5          | 90%      | 2,247       | 11%     |
| Total        |          | 21,070      | 100%    |

*The Effect of Age, Years Played in the NFL and Inflation on Settlement Amounts*

The Settlement Agreement provides maximum monetary awards to players who are less than 45 years old when they are diagnosed with a compensable disease and have played in the NFL for 5 or more years. There is a reduction in the compensation levels based on age and years played beginning with players age 45 or older and players with less than 5 years of experience in the NFL. The Settlement Agreement also provides for an escalation in the compensation amounts to adjust for inflation. These adjustments have a significant effect on the average amount of compensation paid to the former players and a corresponding significant effect on the total compensation paid by the fund.

The magnitude of the effect of age, playing time and inflation depends heavily on the average age of the players when contracting a compensable disease, the number of years the individual played in the NFL and the year the disease is contracted. Table 6-3 summarizes these variables.

<sup>15</sup> Players who played on practice squads were assigned 0.5 years of eligible playing time for each year on a practice squad. The Settlement Agreement applies a 97.5% reduction for players with no eligible seasons. I have assumed that all players have at least 0.5 years played.

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The table shows the average age at the time of diagnosis with the most serious disease is approximately 77 years of age for both groups. Therefore due to the average age at the time of onset of the disease, compensation amounts are subject to significant reductions from the maximum awards.

Table 6-3 also shows that 60% of all players estimated to receive compensation have fewer than the 5 years needed to receive the maximum monetary award. The years played variable shows that the players that have already filed have significantly more years played in the NFL than the future filers.

**Table 6-3**  
**Selected Characteristics of Former Players:**  
**Age, Years Played and Year of Contracting Disease/Injury**

| Player Category | Age At:          |                             | Years Played                                     |                      | Year of Most Serious Injury |
|-----------------|------------------|-----------------------------|--------------------------------------------------|----------------------|-----------------------------|
|                 | 2014 or at Death | Year of Most Serious Injury | Percent of Players with Less Than 5 Years Played | Average Years Played |                             |
| Already Filed   | 52.0             | 76.3                        | 35%                                              | 6.3                  | 2037                        |
| Future Filer    | 51.2             | 77.7                        | 73%                                              | 3.5                  | 2039                        |
| All Filers      | 51.4             | 77.4                        | 60%                                              | 4.4                  | 2039                        |

Table 6-4 shows the effect of these adjustments for age and years played. Without any adjustments, players would be compensated at the maximum value for their injury – shown in the table as the Maximum Monetary Award.

**Table 6-4**  
**Effect of Age, Years Played and Inflation on Average and Total Compensation**  
**by Injury Category**

| Most Serious Injury/ Disease | Maximum Monetary Award | Value After Age Adjustment |                                  | Value After Age and Years Played Adjustment |                                  | Actual Final Value |                                  |
|------------------------------|------------------------|----------------------------|----------------------------------|---------------------------------------------|----------------------------------|--------------------|----------------------------------|
|                              |                        | Average Payment            | Total Compensation (\$ millions) | Average Payment                             | Total Compensation (\$ millions) | Average Payment    | Total Compensation (\$ millions) |
| Compensable Injury/Disease   |                        |                            |                                  |                                             |                                  |                    |                                  |
| ALS                          | \$5,000,000            | \$2,930,000                | \$52.8                           | \$2,120,000                                 | \$38.1                           | \$2,740,000        | \$49.4                           |
| Death w/CTE                  | \$4,000,000            | \$1,910,000                | \$85.8                           | \$1,440,000                                 | \$64.9                           | \$1,440,000        | \$64.9                           |
| Parkinson's                  | \$3,500,000            | \$320,000                  | \$4.5                            | \$190,000                                   | \$2.7                            | \$230,000          | \$3.2                            |
| Alzheimer's                  | \$3,500,000            | \$340,000                  | \$593.8                          | \$190,000                                   | \$340.7                          | \$270,000          | \$474.9                          |
| Level 2                      | \$3,000,000            | \$210,000                  | \$368.8                          | \$140,000                                   | \$246.5                          | \$190,000          | \$341.0                          |
| Level 1.5                    | \$1,500,000            | na                         | na                               | na                                          | na                               | na                 | na                               |
| Total, Compensable           | na                     | na                         | \$1,105.7                        | na                                          | \$693.0                          | na                 | \$933.4                          |

Note: All Level 1.5 are assumed to progress to Level 2. All compensation categorized by most serious injury

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For example, the average payment for diagnosed cases of ALS is \$2.93 million rather than the maximum award amount of \$5 million - a 40% reduction. The average age-adjusted payment for players being diagnosed with Alzheimer's is \$0.34 million, about 90% less than the maximum award amount of \$3.5 million.

Adjusting for years played has a less substantial effect on award values after the age adjustment. For example as Table 6-4 shows, for former players diagnosed with ALS the average payment after the adjustment for number of years played is \$2.1 million – a 28% reduction. The average payment to players diagnosed with Alzheimer's disease is reduced from \$0.34 million to \$0.19 million.

Finally, adjusting for inflation increases average and total compensation. Again, as Table 6-4 shows, adjusting for inflation increases average payments by approximately 30% for ALS and 40% for Alzheimer's, 20% for Parkinson's, no change for death with CTE and approximately 40% for Level 2 neurocognitive disorders. However, the actual final average award amounts for each disease are significantly below the maximum monetary award amounts, resulting in an inflation adjusted total compensation amount of \$933.4 million.

Table 6-5 shows the Monetary Award Grid as it would apply to players who played 3 years in the NFL, *i.e.*, after the discount for 3 playing years is applied. As this table shows, the maximum compensation amounts are 40% lower than the Maximum Award Grid for players who played 5 years or more.

**Table 6-5**  
**Monetary Award Grid, for Players who Played 3 years in NFL at Time of Qualifying Diagnosis<sup>1</sup>**

| Age Group | ALS         | Death w/CTE | Parkinson's | Alzheimer's | Level 2     | Level 1.5 |
|-----------|-------------|-------------|-------------|-------------|-------------|-----------|
| Under 45  | \$3,000,000 | \$2,400,000 | \$2,100,000 | \$2,100,000 | \$1,800,000 | \$900,000 |
| 45 - 49   | \$2,700,000 | \$1,920,000 | \$1,480,000 | \$1,380,000 | \$1,140,000 | \$570,000 |
| 50 - 54   | \$2,400,000 | \$1,380,000 | \$1,140,000 | \$960,000   | \$720,000   | \$360,000 |
| 55 - 59   | \$2,100,000 | \$840,000   | \$780,000   | \$690,000   | \$570,000   | \$290,000 |
| 60 - 64   | \$1,800,000 | \$720,000   | \$600,000   | \$570,000   | \$350,000   | \$170,000 |
| 65 - 69   | \$1,500,000 | \$590,000   | \$460,000   | \$370,000   | \$230,000   | \$110,000 |
| 70 - 74   | \$1,050,000 | \$360,000   | \$290,000   | \$230,000   | \$130,000   | \$60,000  |
| 75 - 79   | \$600,000   | \$100,000   | \$90,000    | \$80,000    | \$50,000    | \$20,000  |
| 80+       | \$180,000   | \$30,000    | \$30,000    | \$30,000    | \$30,000    | \$15,000  |

<sup>1</sup>Assumes no other offsets for stroke, TBI, or non-participation in BAP.

Table 6-6 shows the estimated average value of monetary awards that will be paid for each disease across the various age groups. These average awards take into account both the age discount and the years played discount.

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**Table 6-6**  
**Average Monetary Awards by Age Group at Time of Qualifying Diagnosis for All Players, Fully Discounted**

| Age Group | ALS         | Death w/CTE | Parkinson's | Alzheimer's | Level 2     | Level 1.5   |
|-----------|-------------|-------------|-------------|-------------|-------------|-------------|
| Under 45  | \$2,860,000 | \$2,870,000 | na          | \$1,600,000 | \$2,980,000 | \$1,490,000 |
| 45 - 49   | \$2,390,000 | \$3,490,000 | na          | \$1,160,000 | \$1,540,000 | \$770,000   |
| 50 - 54   | \$2,160,000 | \$1,810,000 | \$452,000   | \$740,000   | \$830,000   | \$420,000   |
| 55 - 59   | \$610,000   | \$2,120,000 | \$1,420,000 | \$500,000   | \$490,000   | \$250,000   |
| 60 - 64   | \$1,060,000 | \$670,000   | na          | \$430,000   | \$310,000   | \$160,000   |
| 65 - 69   | \$520,000   | \$1,100,000 | \$200,000   | \$270,000   | \$140,000   | \$70,000    |
| 70 - 74   | \$470,000   | \$550,000   | \$100,500   | \$150,000   | \$80,000    | \$40,000    |
| 75 - 79   | \$280,000   | \$160,000   | \$106,800   | \$50,000    | \$20,000    | \$10,000    |
| 80+       | \$50,000    | \$40,000    | \$22,500    | \$10,000    | \$10,000    | \$10,000    |

<sup>1</sup>Note the analysis assumes that all Level 1.5 claimants progress to more serious injuries. Thus all Level 1.5 amounts are fully netted against the amounts computed for the players ultimate most serious injury.

na - No former players were in this age/injury category

Table 6-7 shows the estimated total amount of the monetary awards that will be paid for each disease in each age group. These total award amounts take into account both the age discount and the years played discount.

**Table 6-7**  
**Total Monetary Awards by Age Group at Time of Qualifying Diagnosis for All Players, Fully Discounted**

| Age Group | ALS          | Death w/CTE  | Parkinson's | Alzheimer's  | Level 2      | Level 1.5 <sup>1</sup> |
|-----------|--------------|--------------|-------------|--------------|--------------|------------------------|
| Under 45  | \$17,140,000 | \$22,980,000 | na          | \$43,100,000 | \$50,650,000 | \$25,330,000           |
| 45 - 49   | \$7,180,000  | \$13,950,000 | na          | \$37,250,000 | \$16,890,000 | \$8,450,000            |
| 50 - 54   | \$6,490,000  | \$10,840,000 | \$452,000   | \$43,800,000 | \$20,630,000 | \$10,320,000           |
| 55 - 59   | \$610,000    | \$6,370,000  | \$1,420,000 | \$62,570,000 | \$32,540,000 | \$16,270,000           |
| 60 - 64   | \$4,220,000  | \$2,010,000  | na          | \$58,350,000 | \$38,440,000 | \$19,220,000           |
| 65 - 69   | \$2,080,000  | \$5,490,000  | \$600,000   | \$58,140,000 | \$45,420,000 | \$22,710,000           |
| 70 - 74   | \$1,890,000  | \$2,740,000  | \$402,000   | \$45,220,000 | \$31,060,000 | \$15,530,000           |
| 75 - 79   | \$280,000    | \$1,140,000  | \$534,000   | \$23,350,000 | \$12,990,000 | \$6,500,000            |
| 80+       | \$250,000    | \$210,000    | \$225,000   | \$20,810,000 | \$17,460,000 | \$8,730,000            |

<sup>1</sup>Note the analysis assumes that all Level 1.5 claimants progress to more serious injuries. Thus all Level 1.5 amounts are fully netted against the amounts computed for the player's ultimate most serious injury.

na - No former players were in this age/injury category

## Examples of Monetary Award Calculations

In order to illustrate how the monetary award computation is applied, several hypothetical cases are presented in the following tables. For simplicity, it is assumed that the diagnosis occurs in 2013 or earlier. This means that the nominal amounts are not inflated since the inflation adjustment starts in 2014. These examples show the following four cases:

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Table 6-8A shows the monetary award calculation in the case of a 40-year-old player who had 7 playing years and was diagnosed with Alzheimer's with no prior history of stroke or TBI. In this case, there would be no age or years played discount and no joint causality discount, so the player would receive the maximum matrix award value.

**Table 6-8A**  
**Example of Monetary Award Calculation**

Case: 40 years old, 7 years playing, Alzheimer's diagnosis, no Prior Stroke or TBI

|                                           | <u>%</u>  | <u>Amount</u> |
|-------------------------------------------|-----------|---------------|
| Maximum Disease Compensation              | 100%      | \$3,500,000   |
| Less: Age Discount                        | 0%        | \$0           |
| Less: Years Played Discount               | 0%        | \$0           |
| Less: Prior Stroke/TBI Discount           | <u>0%</u> | <u>\$0</u>    |
| Final Award (% of Maximum/Payment Amount) | 100%      | \$3,500,000   |

Table 6-8B shows the monetary award calculation in the case of a 57-year-old who played in the NFL for 3.5 years and was diagnosed with Alzheimer's with no prior history of stroke or TBI. In this case, an age discount of 67% is applied and there is a discount for years played of 30%. The resulting payment would be 23% of the full matrix value (a 77% discount from maximum value).

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**Table 6-8B**  
**Example of Monetary Award Calculation**

Case: 57 years old, 3.5 years playing, Alzheimer's diagnosis, no Prior Stroke or TBI

|                                           | <u>%</u> | <u>Amount</u> |
|-------------------------------------------|----------|---------------|
| Maximum Disease Compensation              | 100%     | \$3,500,000   |
| Less: Age Discount                        | -67%     | -\$2,350,000  |
| Less: Years Played Discount               | -30%     | -\$345,000    |
| Less: Prior Stroke/TBI Discount           | <u>0</u> | <u>\$0</u>    |
| Final Award (% of Maximum/Payment Amount) | 23%      | \$805,000     |

Table 6-8C shows the monetary award calculation in the case of a 62-year-old who played in the NFL for 2 years and was diagnosed with Alzheimer's with no prior history of stroke or TBI. In this case, an age discount of 73% is applied and there is a discount for years played of 60%. The resulting payment would be 11% of the full matrix value (an 89% discount from maximum value).

**Table 6-8C**  
**Example of Monetary Award Calculation**

Case: 62 years old, 2 years playing, Alzheimer's diagnosis, no Prior Stroke or TBI

|                                           | <u>%</u> | <u>Amount</u> |
|-------------------------------------------|----------|---------------|
| Maximum Disease Compensation              | 100%     | \$3,500,000   |
| Less: Age Discount                        | -73%     | -\$2,550,000  |
| Less: Years Played Discount               | -60%     | -\$570,000    |
| Less: Prior Stroke/TBI Discount           | <u>0</u> | <u>\$0</u>    |
| Final Award (% of Maximum/Payment Amount) | 11%      | \$380,000     |



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Table 6-8D shows the monetary award calculation in the case of a 72-year-old who played in the NFL for 10 years and was diagnosed with Alzheimer's with no prior history of stroke or TBI. In this case, an age discount of 89% is applied and there is no discount for years played because he played more than 5 years. The resulting payment would be 3% of the full matrix value (a 97% discount from maximum value).

**Table 6-8D**  
**Example of Monetary Award Calculation**

Case: 72 years old, 10 years playing, Alzheimer's diagnosis, with Prior Stroke

|                                           | <u>%</u>    | <u>Amount</u>     |
|-------------------------------------------|-------------|-------------------|
| Maximum Disease Compensation              | 100%        | \$3,500,000       |
| Less: Age Discount                        | -89%        | -\$3,120,000      |
| Less: Years Played Discount               | 0%          | \$0               |
| Less: Prior Stroke/TBI Discount           | <u>-75%</u> | <u>-\$285,000</u> |
| Final Award (% of Maximum/Payment Amount) | 3%          | \$95,000          |

## 7. Cost Estimate

The analysis forecasts that a total of 3,596 former NFL players who participate in the settlement will contract compensable diseases over the life of the program. The majority of these compensable diseases, about 98%, will be cases of Alzheimer's or Level 2 neurocognitive disorders. The total nominal cost for all compensable diseases including administration costs is estimated to be \$933 million over the life of the program.

### *Total Compensable Claims and Compensation*

Table 7-1 provides a summary of compensable claims and total compensation by type of injury. The overwhelming percent of compensable claims and compensation are paid to former players with Alzheimer's disease or Level 2 neurocognitive disorders – 98% of compensable claims and 87% of compensation. The distribution of claims reflects the relative probabilities of the occurrence of the various diseases in the general population combined with the additional incidence related to concussions.

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**Table 7-1**  
**Former Players with Compensable Concussion-Related Injury**  
**by Type of Injury with Total Compensation**  
**(\$ millions)**

| Most Serious Injury/ Disease | Total Claims |         | Total Compensation |         |
|------------------------------|--------------|---------|--------------------|---------|
|                              | Count        | Percent | Amount             | Percent |
| Compensable Injury/Disease   |              |         |                    |         |
| ALS                          | 18           | 0.5%    | \$49.4             | 5.3%    |
| Death w/CTE                  | 46           | 1.3%    | \$64.9             | 7.0%    |
| Parkinson's                  | 14           | 0.4%    | \$3.2              | 0.3%    |
| Alzheimer's                  | 1,757        | 48.9%   | \$474.9            | 50.9%   |
| Level 2                      | 1,761        | 49.0%   | \$341.0            | 36.5%   |
| Level 1.5                    | na           | na      | na                 | na      |
| Total, Compensable           | 3,596        | 100.0%  | \$933.4            | 100.0%  |
| Not Compensated              | 17,474       | na      | na                 | na      |
| Grand Total                  | 21,070       | na      | \$933.4            | 100.0%  |

Note: All compensation categorized by most serious injury. All Level 1.5 claims are assumed to progress to Level 2 and more serious levels. \$248 million is paid to former players at Level 1.5. This amount is included in the category of their most serious disease as follows: \$212 million paid at Level 2; \$34 million to Alzheimer's and \$2 million to other disease types. Players are not compensated because they did not experience a compensable injury or did not file a claim.

#### *Timing of Compensation Payments and Funding*

Table 7-2 shows the timing of payments to former players and the receipt of funding by the settlement fund through the payment of the last compensable claim. The timing and total amount of funding are sufficient to pay all claims.

- Compensation payments in the first five years are high because there are a relatively large number of former NFL players who have indicated they intend to file a claim. These claimants include former players who have already been diagnosed with a disease and will be paid in the first few years of the settlement fund. After these claims are resolved, the fund will be receiving and paying claims at a significantly lower rate as the filing of future claims depends on the timing of the manifestation of future compensable injuries.
- The initial funding amount of approximately \$364 million (55% of the total funding) is designed to provide enough assets to pay the compensable claims already identified and to cover the startup costs of the claim processing facility while still leaving a significant

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asset. The remaining assets are supplemented with an additional \$311 million, which is paid in annual installments through 2033. At that time the remaining assets of the settlement fund (with earnings) are sufficient to pay all remaining claims.

- The Fund Balance increases through 2034 as the additional funding and earnings exceed the required amount to pay claims. The fund balance begins to decline after that as the settlement fund continues to pay claims, but with earnings as its only source of revenue - there is no additional funding contributed after 2033. The last claim is paid in the early 2080s, at which time the fund is estimated to have a balance of approximately \$80 million.<sup>16</sup>

**Table 7-2**  
**Settlement Fund Compensation Payments, Funding and Earnings**  
**Through the Payment of the Last Compensable Claim**  
**(\$ millions)**

| Time Period        | Compensation<br>Amount <sup>1</sup> | Funding | Earnings | End of Period<br>Fund<br>Balance |
|--------------------|-------------------------------------|---------|----------|----------------------------------|
| 2014 through 2018  | \$292.3                             | \$364.0 | \$25.0   | \$91.6                           |
| 2019 through 2023  | \$78.2                              | \$103.7 | \$28.1   | \$143.8                          |
| 2024 through 2028  | \$95.5                              | \$103.7 | \$38.6   | \$189.0                          |
| 2029 through 2038  | \$178.6                             | \$103.7 | \$103.2  | \$214.0                          |
| 2039 through 2048  | \$167.7                             | \$0.0   | \$72.9   | \$116.2                          |
| Remaining 35 Years | \$133.3                             | \$0.0   | \$103.4  | \$80.4                           |
| Total              | \$945.5                             | \$675.0 | \$371.2  | na                               |

<sup>1</sup>Includes processing Costs

Note: Funding plus earnings is actually slightly in excess of the amount needed to pay all claims.

### *Inflation and Real Rate of Return*

A key assumption in determining whether the settlement is adequately funded is the real rate of return earned on settlement assets. I have assumed a 2.5% real rate of return – a 4.5% nominal yield and an underlying 2.0% inflation rate. The actual expected return is dependent on the real returns available for different types of assets and the portfolio mix adopted by the settlement administrators.

<sup>16</sup> The \$80 million balance in the early 2080s implies overfunding of only approximately \$5 million at 2014 levels.

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Historical experience suggests that a real rate of return of 2.5% is at the lower level of expected returns. Returns on debt and equity both exceed 2.5% real rate of return over long periods of time. Indeed, even an extremely high reliance on low risk financial assets historically has yielded more than 2.5% annually. However, because of historically low bond yields in recent years, I conservatively assumed a 2.5% return.

Studies of real rates of return reflect that over long periods of time through recent years, the real rate of return (after inflation) on long-term U.S. government bonds was approximately 3.4% annually; municipal bonds yielded approximately 3.9% real return annually and equities of different categories yielded 5-6% in real return annually. Thus, any mixed portfolio of equities and long-term government bonds would have yielded a 4% to 5% annual return in real terms.

The average annualized real return for a 50% equity/50% bond portfolio over the last 80+ years both for expansionary periods and for recessions exceeds 2.5%. Indeed, the average annual real return for recessions is 5.26%, while for expansions, it is 5.59%.

Finally, an examination of mutual funds (and among them, focusing on the ones with conservative asset allocation) shows that the overwhelming majority (98.3%) of funds returned at least 2.5% in real terms over the last five years.<sup>17</sup>

#### *Timing of Claim Payments*

There will be a time lag between the time a claim is filed and the date of disbursement of compensation. To allow for claims to be reviewed, processed (including the curing of any deficiencies) and paid, the analysis assumes that payments for all the claims filed within any given calendar year will be paid within 24 months (an average of 12 months) based on the following distribution of claim payments:

- 30% will be paid in the year the claim is filed
- 40% will be paid in the year after the claim was filed
- 30% will be paid in the second year after the claim was filed.

The analysis assumes that all of the claims that have already been filed and have diagnoses or the player is deceased will be paid - 70% in 2015 and 30% in 2016<sup>18</sup>.

The model is based on a nominal rate of return on invested funds of 4.5%. Inflation over the life of the fund is assumed to be 2.0% per year and this rate is applied to future monetary award amounts as well as administration costs.

<sup>17</sup> References: David Blanchett, Michael Finke and Wade D. Pfau (2013), "Low Bond Yields and Safe Portfolio Withdrawal Rates," Morningstar Investment Management, January 21, 2013; Joseph Davis and Daniel Piquet (2011), "Recessions and balanced portfolio returns," Vanguard, October 2011, and; Thornburg Investment Management (2013), "A Study of Real Real Returns," July 2013.

<sup>18</sup> A 95% participation rate assumption is applied to claims already filed that do not have a current diagnosis.

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*Administration Costs*

Based on information provided by the Claims Administrator and the CMS Lien Administrator, the following costs have been included in the cash flow modeling:

- Start-up costs – a total of \$2 million in start-up costs for the Monetary Award Fund are assumed to occur in 2014.
- Claim review and processing costs – an average cost of \$750 per claim including both valid claims and claims that will not be paid are assumed to be incurred at the time of diagnosis for valid claims. It is assumed that there will be an equal number of valid and invalid claims. Therefore the model applies a combined total cost of \$1,500 to each valid claim.
- CMS lien processing – there will be a \$100 processing charge to the MAF applied to each claim, which is applied to both valid and invalid claims. It is assumed that there will be an equal number of valid and invalid claims. Therefore, the model applies a combined total cost of \$200 to each valid claim. All other costs for CMS lien handling are charged against individual monetary awards and does not affect the cash flow of the settlement fund.
- Payments to the Special Master of \$100,000 per year for five years.

*Player Participation Rates*

The participation rate in the Settlement program among eligible former NFL players is a significant factor in determining the number of claims that will be filed and thus also the amount of funds required to resolve the claims.

In order to establish an estimate of the participation rate, several factors were considered. First, experience with participation rates in other mass tort cases was reviewed. In general, participation rates in mass torts are dependent on the outreach and notice program, the lag from exposure/injury to the manifestation of a compensable disease/injury and award size. For comparison, the participation rates for various large and widely publicized class action settlements and data on consumer product recall response rates were considered:

- Breast implant settlement achieved registrations from 30% of the eligible class members (440,000 of 1.5 million), based on an advertising-only class notification program.
- Consumer product recall response rates range from 4% to 18% according to the U.S. Consumer Product Safety Commission (CPSC).

In the case of former NFL players, approximately 4,200 claims were already registered at the time this analysis was prepared, which represents more than 20% of the potentially eligible population of approximately 20,200 former players.<sup>19</sup> I understand that former players have been

<sup>19</sup> Additional claims have been filed since this analysis was performed.

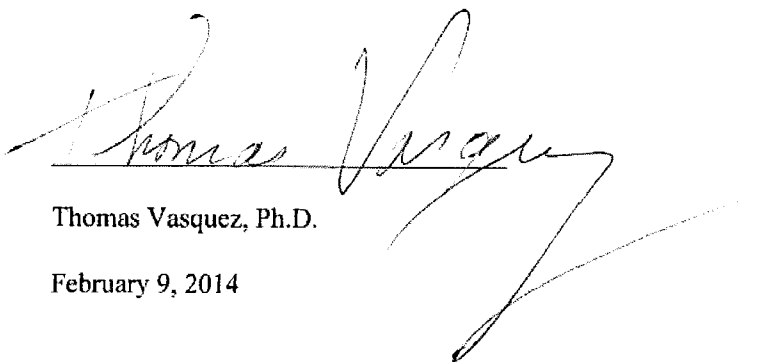
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and continue to be contacted by plaintiff lawyers and others to participate. Whether continuing further efforts are likely to attract a significant number of additional players is not certain.

Nonetheless, it is assumed that the participation rates in this settlement will achieve high levels because the settlement has very high public visibility and contact information available through the NFL Players union and other sources that can be used in the notification process is available for a large portion of the potentially eligible population. My forecast of the number of future claims and the resulting cash requirements to fund the settlement assumes that: (1) 100% of deceased players with CTE will participate, (2) 20% of players deceased from 2000 through 2005 will participate, (3) 100% of players with a diagnosis that have already filed claims will participate, (4) 95% of players without a diagnosis that have already filed a claim will participate and (5) 50% of the living and deceased former NFL players that have not yet filed will ultimately participate. These assumptions yield an approximately 60% participation rate for all potentially eligible former players.

The Settlement Agreement provides a Baseline Assessment Program (BAP) for players who participate in the settlement. However, if a player (who is not yet diagnosed with a compensable disease) registers to participate in the Settlement Agreement but does not participate in the baseline assessment provided for under the BAP, a 10% discount is applied to any future monetary award for a compensable disease. This analysis assumed that all players who participate in the Settlement Agreement will also participate in the BAP and therefore no discounts were applied to future compensation awards.

My work on this matter is ongoing. I reserve the right to update or expand upon the opinions expressed in this report on the basis of that work, and in response to any analysis put forth by other experts.



Thomas Vasquez, Ph.D.

February 9, 2014

## Appendix A: Determination of Incidence Rates

### *Background Incidence*

This section describes ARPC's methodology and reference sources used to determine background incidence rates of diseases that might be associated with concussions and other repetitive head injuries, and therefore, potentially considered as a compensable disease. When incidence rates were available by gender, we captured the rates for men only. For some diseases, rates were not available by gender; in these cases the reported statistics are for both genders.

### *Extrapolating to younger ages*

For some diseases, incidence (or prevalence) rates were available only for the population above a certain age (*e.g.*, 65). In these cases, we assumed that the rate for a 20-year-old would be equal to one-hundredth of the rate for a 65-year-old. For ages between 20 and 65, we assumed that the rate increases exponentially.

The literature indicates that diseases associated with advanced age (*e.g.*, Alzheimer's and dementia), rarely occur in young age, and reliable statistics for young ages are not available.

### *Exponential smoothing*

Diseases for which there were estimates of incidence available for various age ranges instead of a particular age, a midpoint in the age range was chosen (in the case of ages 85+, typically age 90 was used), and the estimated incidence rate for that age group was assigned to that midpoint. Between data points, an exponential curve was fit based on the starting and ending rates, and the number of years in between them.

### *Stroke-Related Alzheimer's disease and Dementia*

Alzheimer's disease and dementia can sometimes be attributed to prior history of stroke. According to epidemiological research, 8 to 10 percent of Alzheimer's and dementia patients had a history of stroke prior to the onset of Alzheimer's or dementia. Claimants who fall into this category will receive 25 percent of the compensation they would receive if they had not had a prior history of stroke. To reflect the reduction in the total compensation amount, the overall incidence numbers for Alzheimer's and dementia were reduced by a number equal to 75 percent of those who also had prior history of stroke (*i.e.*, only a quarter of those with a stroke history are included in the background incidence).

## ***References***

- Dodge, Chang, Kamboh, Ganguli (2011), “Risk of Alzheimer’s Disease Incidence Attributable to Vascular Disease in the Population,” *Alzheimers Dement.* 2011 May; 7(3): 356–360

## ***Approach and Reference Sources for Specific Conditions***

### **1. Alzheimer’s Disease**

Table 1 of Hebert, et al. (2001) provides the estimated annual number of incidence cases from 1995 through 2050 by age group. Figures for 2010 were used in the life cycle model. Estimates were available for the following three age categories: 65-74, 75-84, and 85+. To calculate an estimate for age categories between 20 and 65, an exponential extrapolation method was used, by also assuming that the rate for a 20-year-old was one hundredth of the rate for a 65-year-old. No gender-specific rates were available therefore the statistics are for both genders. However, many studies of the age-specific incidence (development of new cases) of Alzheimer’s disease or any dementia have found no significant difference by gender.

As noted earlier, a final modification was made to the incidence rates based on the number of Alzheimer’s disease patients who have had a stroke history to account for joint causality.

## ***References***

- Alzheimer’s Association, “2013 Alzheimer’s Disease Facts and Figures,” 2013
- Hebert, Beckett, Scherr, and Evans, “Annual Incidence of Alzheimer’s Disease in the United States Projected to the Years 2000 Through 2050,” *Alzheimer’s Disease and Associated Disorders* 2001; Vol. 15, No. 4, pp. 169–173

### **2. ALS**

An overall incidence rate was reported from two sources, both citing the same figure: 2 per 100,000 persons per year. While ALS can be diagnosed at any age, typically it is diagnosed between age 40 and 70. Hence, it was assumed that the rate is constant 2/100,000 for ages between 40 and 70. For under age 40, the extrapolation to younger ages was performed, as



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described above. For over age 70, the incidence rate was assumed to be 2/100,000. No gender-specific rates were available therefore the statistics are for both genders.

### **References**

- ALS Association, “Epidemiology of ALS and Suspected Clusters,” retrieved from <http://www.alsa.org/als-care/resources/publications-videos/factsheets/epidemiology.html> on July 1, 2013.
- The Robert Packard Center for ALS at Johns Hopkins, “ALS Facts and Statistics”, retrieved from [http://www.alscenter.org/living\\_with\\_als/facts\\_statistics.html](http://www.alscenter.org/living_with_als/facts_statistics.html) on July 15, 2013.
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- Clark, Pritchard and Sunak, “The Epidemiology and Etiology of Amyotrophic Lateral Sclerosis: An Integrated and Inter-Disciplinary Perspective”, *A Working Report to the Department of Public Health, State of Massachusetts* on behalf of the ALS Therapy Development Foundation, Massachusetts, page 2 of 106 retrieved from [http://www.researchals.org/uploaded\\_files/mdph\\_alsreport\\_211aDS.pdf](http://www.researchals.org/uploaded_files/mdph_alsreport_211aDS.pdf) on June 25, 2013.

### **3. Parkinson’s Disease**

The incidence rates for Parkinson’s disease were obtained from a study by Van Den Eeden et al. (2003), which examined newly diagnosed Parkinson’s disease cases in 1994-1995 among members of the Kaiser Permanente Medical Care Program of Northern California. Table 2 of the study provides annual incidence rates by age and gender. The statistics we use are for men only.

### **References**

- Van Den Eeden, Tanner, Bernstein, Fross, Leimpeter, Bloch, and Nelson, “Incidence of Parkinson’s Disease: Variation by Age, Gender, and Race/Ethnicity,” *Am. J. Epidemiol.* 2003; 157 (11): 1015–1022

### **4. Dementia**

Incidence rates were available from multiple sources for dementia. In particular, the following sources were used:

- Corrada, et al. (2010); Table 2; Incidence rates for 4 specific age groups; US – men only
- Fitzpatrick, et al. (2004); Table 1; Incidence rates for 4 specific age groups; US – white men only
- Ganguli, et al. (2000); Table 1; Incidence rates for 6 specific age groups; US – men only; more severe dementia with CDR $\geq$ I.0
- Hendrie, et al. (2001); Table 5; Incidence rates for 3 specific age groups; African Americans in US – both sexes
- Knopman, et al. (2006); Table 1; Incidence rates for 9 specific age groups; US – men only
- Jorm and Jolley (1998); Table 2; Incidence rates for 5 specific age groups; US – both sexes; moderate+ dementia
- Riedel-Heller, et al. (2001); Table 1 and 2; Incidence rates for 4 specific age groups; Germany – men only

After careful examination of these data sources, the rates reported by Corrada, et al. (2010) and Knopman, et al. (2006) appeared to be outliers relative to the other sources. Therefore, these two studies were excluded and average age-specific incidence rates were calculated on the basis of the other five studies. As indicated above, all of these sources reported age-specific rates, but only for people older than 65. To estimate incidence rates for people younger than 65, Harvey et al. (2003) was used. This study reported age-specific prevalence rates for the population between 30 and 65. These prevalence rates were very small (each of them significantly smaller than the incidence rates for each of the age categories above 65). Since for a terminal (*i.e.*, incurable) disease such as dementia, prevalence is always an upper bound for incidence, we assumed that incidence rates for the population below 65 is equal to the prevalence rate.

A modification was made to these dementia incidence rates because of the relationship between Alzheimer's disease and dementia. Alzheimer's disease is the most common type of dementia, and eventually all Alzheimer's patients will develop dementia. However, not all dementia is due to Alzheimer's disease.<sup>20</sup> Thus, the calculated overall dementia incidence rates shown above in figure 2.1 include all cases of Alzheimer's disease. To correct for this, the Alzheimer's disease incidence rates were subtracted from the overall dementia incidence rates. Consistent with Friedenber (2003), exclusion of Alzheimer's disease incidence approximately halved the calculated incidence of dementia – for example, at age 95, the 4.103% Alzheimer's incidence rate was subtracted from the overall dementia incidence rate of 9.57%, resulting in a non-Alzheimer's dementia incidence rate of 5.467%.

As noted above in the general remarks, a final modification was made to the incidence rates based on the number of dementia patients who have had a stroke history.

<sup>20</sup> One study, by Friedenber (2003), found that patients with Alzheimer's disease comprised approximately 50% of all dementia cases, with Lewy dementia and frontotemporal dementia each comprising approximately 15% of total dementia cases, and vascular dementia comprising a further 10% of all dementia cases.

## References

- Alzheimer's Association, "2013 Alzheimer's Disease Facts and Figures," 2013
- Corrada, Brookmeyer, Paganini-Hill, Berlau, and Kawas, "Dementia Incidence Continues to Increase with Age in the Oldest Old: The 90+ Study," *Ann Neurol.* 2010 January; 67(1): 114–121
- Fitzpatrick, Kuller, Ives, Lopez, Jagust, Breitner, Jones, Lyketsos, and Dulberg, "Incidence and Prevalence of Dementia in the Cardiovascular Health Study," *Journal of American Geriatric Society* 2004; 52: 195–204
- Friedenber, "Dementia: One of the Greatest Fears of Aging," *Radiology* 2003; 229: 632–635
- Ganguli, Dodge, and Chen, "Ten-year Incidence of Dementia in a Rural Elderly US Community population: The MoVIES Project," *Neurology* 2000; 54: 1109–1116
- Harvey, Skelton-Robinson, and Rossor, "Prevalence and Causes of Dementia in People Under the Age of 65 Years," *J Neurol Neurosurg Psychiatry* 2003; 74: 1206–1209
- Hendrie, Ogunniyi, Hall, Baiyewu, Unverzagt, Gureje, Gao, Evans, Ogunseyinde, Adeyinka, Musick, and Hui, "Incidence of Dementia and Alzheimer Disease in 2 Communities," *JAMA* February 14, 2001; Vol. 285, No. 6 739–747
- Jorm and Jolley, "The incidence of dementia: A meta-analysis," *Neurology* 1998; 51: 728–733
- Knopman, Petersen, Cha, Edland, and Rocca, "Incidence and Causes of Nondegenerative Nonvascular Dementia," *Arch Neurol.* 2006; 63: 218–221
- Riedel-Heller, Busse, Aurich, Matschinger, and Angermeyer, "Incidence of Dementia According to DSM-III-R and ICD-10," *British Journal of Psychiatry* 2001; 179: 255–260

## Induced Incidence/Risk Multiplier

This section describes the methodology and sources used for estimating the increased risk to professional football players (or comparables) relative to the general population of developing certain compensable diseases.

For Alzheimer's disease, Parkinson's, ALS and dementia, a risk multiple of 2.0 for ages 20 through 60 was used. After age 60, it was assumed that the relative risk is more additive in nature than multiplicative, and so the induced incidence is calculated as the background (general population) incidence at those ages, plus the induced incidence rates at age 60 for each of the diseases

For each of the particular diseases discussed below, there were multiple sources reporting a risk to professional football players as a multiple of the risk experienced by the general population. Unless otherwise specified, risk multiples are uniform across ages (e.g., the relative risk is the

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same across ages for professional football players). For the majority of diseases, no peer-reviewed published research on the risk to professional football players relative to the general population has been identified.

It is clear that the literature and studies to date conclude a wide range of estimates of the relative risk associated with concussion or other forms of brain injury. The results vary from relative risk significantly under 1.0 to risks in excess of 3.0. Many if not all of the studies have issues that question their accuracy. These issues include items such as small sample sizes, types of populations, types of injuries and characteristics of the studied population.

### *Specific diseases, disorders, injuries, and symptoms*

## **5. Alzheimer's Disease**

There were two sources identified that report the relative risk of Alzheimer's for professional football players (Guskiewicz (2005) and Lehman (2012)) and three studies on the risk from mild traumatic brain injuries for developing Alzheimer's disease. The induced incidence rates reported in these studies range from 0.76 to 4.1. Lehman (2012) reported that the risk of Alzheimer's being a contributing factor to death, *i.e.*, not necessarily the underlying cause, was 3.86 times greater for former NFL players who had played 5 years or more than for the general population. Guskiewicz (2005) noted a differential in the risk as a function of age, with the risk declining from 4 among younger players to 1 for players over the age of 75.

Mortimer (1991), in a meta-analysis of 7 previous studies, found a relative risk of 2.67 for men. Nemetz (1999) found that the standardized incidence ratio was 1.4 for men who had experienced a traumatic brain injury, from a population cohort in Olmsted County, Minnesota. Mehta (1999), using a population cohort from Rotterdam, The Netherlands, found a relative risk for men of 0.9. Plassman (2000), in a population-based cohort study of U.S. World War II veterans, found a hazard ratio for those who suffered a mild head injury (defined as a "loss of consciousness or post-traumatic amnesia for less than 30 minutes, with no skull fracture") of 0.76. Schofield (1997), in a community longitudinal study in Manhattan, NY, found a relative risk of developing Alzheimer's of 4.1 for those who had a history of head injury.

### **References**

- Guskiewicz, Kevin M., et al., "Association between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players," *Neurosurgery*, Vol. 57, No. 4 (Oct. 2005): 719-726

- Lehman, Everett J., et al., “Neurodegenerative causes of death among retired National Football League players,” *Neurology* Vol. 79 (Nov. 6, 2012): 1-5
- Mehta, K.M., et al., “Head trauma and risk of dementia and Alzheimer’s disease,” *Neurology*, Vol. 53 (1999): 1959-1962
- Mortimer, J.A., et al., “Head Trauma as a Risk Factor for Alzheimer’s Disease: A Collaborative Re-Analysis of Case-Control Studies,” *International Journal of Epidemiology*, Vol. 20, No. 2 (1991): S28-S35
- Nemetz, Peter N., et al., “Traumatic Brain Injury and Time to Onset of Alzheimer’s Disease: A population-based study,” *American Journal of Epidemiology* Vol. 149, No. 1 (1999): 32-40
- Plassman, B.L., et al., “Documented head injury in early adulthood and risk of Alzheimer’s disease and other dementias,” *Neurology*, Vol. 55 (2000): 1158-1166
- Schofield, P.W. et al., “Alzheimer’s disease after remote head injury: an incidence study,” *Journal of Neurology, Neurosurgery and Psychiatry*, Vol. 62 (1997): 119-124

## 6. ALS

There was no study that directly isolated the induced risk of ALS among former NFL players. The findings of three studies reported estimated induced incidence ranging from 1.13 to 4.31. These include the Lehman study (Lehman (2012)), which looked at ALS as a contributing factor (*i.e.*, not necessarily the specific cause of death) for a more exposed population of retired professional football players – those who had played 5 years or more. From the Schmidt (2010) study of veterans, we calculated a risk multiple of 1.13 for veteran suffering head injuries developing ALS relative to those without head injuries.<sup>21</sup> No age-breakdowns were available from Lehman (2012) or Schmidt (2010) (although Schmidt did provide a breakdown for the age at the time of the last injury, with those being injured after age 29 being at a 1.49 times risk). Chio (2005) looked at the effect of age on risk among a population of Italian soccer players, and found that for ages up to 49, the Standard Morbidity Ratio was 7.5, but then fell to 4.2 for those older than 50.

## References

- Lehman, Everett J., et al., “Neurodegenerative causes of death among retired National Football League players,” *Neurology* Vol. 79 (Nov. 6, 2012): 1-5
- Schmidt, Silke, et al., “Association of ALS with Head Injury, Cigarette Smoking and APOE Genotypes,” *Journal of Neurological Science* Vol. 291 (April 2010): 22-29

<sup>21</sup> Schmidt (2010) reported Odds Ratios in its text. We have calculated from the underlying data reported in Schmidt (2010) a risk multiple for ease of comparison to the other studies.

- Chio, Adriano, et al., “Severely increased risk of amyotrophic lateral sclerosis among Italian professional football players,” *Brain* Vol. 128 (2005): 472-476

## 7. Dementia

Five studies were considered with respect to the increased risk of dementia. These studies produced estimates of induced risk ranging from 0.7 to 3.86. Again, Lehman (2012) reported that the risk of Dementia as a contributing factor to a player’s death (*i.e.*, not necessarily the specific cause of death) was 3.86. Mehta (1999), in a population-based cohort from The Netherlands, found the risk multiple for men developing dementia was 0.7. Plassman (2000) found that hazard rate for a cohort of U.S. Navy and Marine veterans of World War II was 1.33. Finally, Lee (2013), in a population-based study from Taiwan, found a hazard ratio of 3.26. Another source, Amen (2011) was excluded because of the small sample size (n=100), and inconsistency between prevalence and incidence in its calculations.

## References

- Amen, Daniel G. et al., “Impact of Playing American Professional Football on Long-Term Brain Function,” *Journal of Neuropsychiatry and Clinical Neuroscience*, Vol. 23, No. 1 (Winter 2011): 98-106
- Lee, Yi-Kung, et al., “Increased Risk of Dementia in Patients with Mild Traumatic Brain Injury: A Nationwide Cohort Study,” *PLOS ONE*, Vol. 8, No. 5 (May 2013): 1-7,
- Lehman, Everett J. et al., “Neurodegenerative causes of death among retired National Football League players,” *Neurology* Vol. 79 (Nov. 6, 2012): 1-5
- Mehta, K.M. et al., “Head trauma and risk of dementia and Alzheimer’s disease,” *Neurology*, Vol. 53 (1999): 1959-1962
- Plassman, B.L. et al., “Documented head injury in early adulthood and risk of Alzheimer’s disease and other dementias,” *Neurology*, Vol. 55 (2000): 1158-1166

## 8. Parkinson’s Disease

Four sources were identified that calculated a risk multiple for Parkinson’s Disease, one based on a study of retired NFL players, and three more generalized to the risk of Parkinson’s after a traumatic brain/head injury. These studies reported risk multiples ranging from 1.44 to 1.69. The Lehman (2012) study found that the risk of a retired NFL player dying with Parkinson’s as a contributing factor was 1.69 times greater than that of the male general population.

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From the Bower (2003) study of U.S. males and females from Rochester, Minnesota we calculated a risk multiple of 1.76, while from Lee (2012), we calculated a 1.44 risk multiple for the central-California-based sample. From the Goldman (2006) study on male twin pairs, we calculated a risk multiple of 1.48.<sup>22</sup> Both Goldman (2006) and Bower (2003) are for males only, while the only data available from Lee (2012) was for both genders. Multiple additional studies on the impact of brain trauma are available (summarized in Goldman (2006)), but all were conducted in the 1980s and 1990s. No further breakdowns of the multiple by age were available in any of the studies.

### References

- Bower, J.H. et al, “Head Trauma Preceding PD: A Case-Control Study,” *Neurology* Vol. 60 (2003): 1610-1615
- Goldman, Samuel M. et al., “Head Injury and Parkinson’s Disease Risk in Twins,” *Annals of Neurology*, Vol. 60 (2006): 65-72
- Lee, Pei-Chen et al., “Traumatic Brain Injury, Paraquat Exposure, and Their Relationship to Parkinson Disease,” *Neurology* Vol. 79 (2012): 2061-2066.
- Lehman, Everett J. et al., “Neurodegenerative causes of death among retired National Football League players,” *Neurology* Vol. 79 (Nov. 6, 2012): 1-5

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<sup>22</sup> Bower (2003), Lee (2012) and Goldman (2006) all reported only the Odds Ratios in their texts, so for comparison purposes, we have calculated the corresponding Risk Ratio for use in the average.

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**Appendix B: Annual Cash Flow Model and Assumptions**

| Cash Flow Modeling Assumptions           |               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|------------------------------------------|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Item Category                            | Assumed Value | Notes                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Funding and Investment</b>            | 2.0%          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Inflation on Monetary Award Amounts      | 2.5%          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Real rate of return on invested funds    | 4.5%          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Nominal rate of return on invested funds |               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <b>Claim Review and Processing</b>       |               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Facility start up costs                  | \$2,000,000   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Cost per claim                           | \$1,700       | Expected cost for claim review and processing is \$750/claim. There is an additional \$100 fee per claim for processing medicare liens. Both fees are applied to claims that are filed, including those that are valid for payment and claims that will not be paid. The model counts the number of valid claims. It is assumed that there will be an equal number of payable and non-payable claims so a total cost of \$1,700 per valid claim is used in the model (2 x \$750) + (2 x \$100) |
| Inflation on processing costs            | 2.0%          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |



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Dollars by Year Paid - Accounting for Payment Lag and Participation Rate  
(\$ millions)

| Year  | Filers  |         | Futures |         | Deceased >2005 |        | Death w/ CTE |        | Deceased <=2005 |       | Processing Cost |       | Total   |         |
|-------|---------|---------|---------|---------|----------------|--------|--------------|--------|-----------------|-------|-----------------|-------|---------|---------|
|       | Nom.    | NPV     | Nom.    | NPV     | Nom.           | NPV    | Nom.         | NPV    | Nom.            | NPV   | Nom.            | NPV   | Nom.    | NPV     |
| Total | \$426.9 | \$251.2 | \$415.7 | \$179.1 | \$19.3         | \$17.8 | \$65.7       | \$60.7 | \$5.7           | \$5.3 | \$10.1          | \$3.2 | \$945.5 | \$519.4 |
| 2013  |         |         |         |         |                |        |              |        |                 |       |                 |       |         |         |
| 2014  |         |         |         |         |                |        |              |        |                 |       |                 |       | \$2.0   | \$2.0   |
| 2015  | \$98.0  | \$91.8  | \$12.5  | \$11.7  | \$13.5         | \$12.6 | \$46.0       | \$43.1 | \$4.0           | \$3.8 | \$0.2           | \$0.2 | \$174.2 | \$163.0 |
| 2016  | \$46.8  | \$41.9  | \$10.3  | \$9.3   | \$5.8          | \$5.2  | \$19.7       | \$17.7 | \$1.7           | \$1.5 | \$0.2           | \$0.2 | \$84.5  | \$75.7  |
| 2017  | \$8.0   | \$6.9   | \$7.9   | \$6.7   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$16.0  | \$13.7  |
| 2018  | \$6.8   | \$5.5   | \$8.6   | \$7.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.2 | \$15.5  | \$12.7  |
| 2019  | \$6.4   | \$5.0   | \$9.1   | \$7.2   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$15.7  | \$12.3  |
| 2020  | \$6.2   | \$4.7   | \$9.2   | \$6.9   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$15.5  | \$11.6  |
| 2021  | \$5.6   | \$4.0   | \$8.5   | \$6.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$14.1  | \$10.2  |
| 2022  | \$5.8   | \$4.0   | \$9.7   | \$6.7   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$15.6  | \$10.7  |
| 2023  | \$7.1   | \$4.7   | \$10.1  | \$6.6   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$17.3  | \$11.4  |
| 2024  | \$8.2   | \$5.2   | \$10.2  | \$6.4   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$18.6  | \$11.7  |
| 2025  | \$8.3   | \$5.0   | \$11.5  | \$6.9   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$19.9  | \$12.0  |
| 2026  | \$7.3   | \$4.2   | \$12.4  | \$7.2   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$19.8  | \$11.4  |
| 2027  | \$7.4   | \$4.1   | \$11.8  | \$6.5   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$19.3  | \$10.7  |
| 2028  | \$6.9   | \$3.6   | \$10.8  | \$5.7   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$17.8  | \$9.4   |
| 2029  | \$7.5   | \$3.8   | \$10.0  | \$5.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$17.6  | \$8.9   |
| 2030  | \$9.1   | \$4.4   | \$8.5   | \$4.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$17.7  | \$8.6   |
| 2031  | \$8.8   | \$4.1   | \$8.1   | \$3.7   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$17.0  | \$7.9   |
| 2032  | \$7.4   | \$3.3   | \$9.1   | \$4.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.1 | \$16.7  | \$7.4   |
| 2033  | \$6.6   | \$2.8   | \$9.7   | \$4.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$16.4  | \$7.0   |
| 2034  | \$7.4   | \$3.0   | \$9.3   | \$3.8   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$16.8  | \$6.8   |
| 2035  | \$8.0   | \$3.1   | \$9.6   | \$3.7   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$17.8  | \$6.9   |
| 2036  | \$9.0   | \$3.3   | \$10.3  | \$3.8   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$19.5  | \$7.2   |
| 2037  | \$9.2   | \$3.3   | \$10.4  | \$3.7   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$19.8  | \$7.0   |
| 2038  | \$8.8   | \$3.0   | \$10.3  | \$3.5   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$19.3  | \$6.6   |
| 2039  | \$7.6   | \$2.5   | \$10.0  | \$3.3   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$17.8  | \$5.8   |
| 2040  | \$6.9   | \$2.2   | \$11.5  | \$3.6   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$18.7  | \$5.8   |
| 2041  | \$6.8   | \$2.0   | \$11.5  | \$3.4   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$18.6  | \$5.5   |
| 2042  | \$6.7   | \$1.9   | \$10.6  | \$3.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$17.6  | \$5.0   |
| 2043  | \$7.8   | \$2.1   | \$8.2   | \$2.2   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$16.1  | \$4.4   |
| 2044  | \$8.1   | \$2.1   | \$7.7   | \$2.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$16.0  | \$4.2   |
| 2045  | \$8.8   | \$2.2   | \$6.5   | \$1.6   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$15.5  | \$3.9   |
| 2046  | \$7.9   | \$1.9   | \$8.4   | \$2.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.3           | \$0.1 | \$16.5  | \$4.0   |
| 2047  | \$6.4   | \$1.5   | \$9.5   | \$2.2   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$16.1  | \$3.7   |
| 2048  | \$4.5   | \$1.0   | \$10.2  | \$2.2   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.1 | \$14.9  | \$3.3   |
| 2049  | \$3.9   | \$0.8   | \$8.2   | \$1.7   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$12.3  | \$2.6   |
| 2050  | \$3.8   | \$0.8   | \$7.9   | \$1.6   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$11.8  | \$2.4   |
| 2051  | \$4.2   | \$0.8   | \$6.6   | \$1.3   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$11.0  | \$2.1   |
| 2052  | \$4.6   | \$0.8   | \$5.7   | \$1.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.3           | \$0.0 | \$10.6  | \$1.9   |
| 2053  | \$4.6   | \$0.8   | \$5.5   | \$1.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.3           | \$0.0 | \$10.3  | \$1.8   |
| 2054  | \$3.7   | \$0.6   | \$5.2   | \$0.9   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$9.2   | \$1.5   |
| 2055  | \$2.8   | \$0.5   | \$5.2   | \$0.8   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$8.2   | \$1.3   |
| 2056  | \$2.5   | \$0.4   | \$4.5   | \$0.7   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$7.3   | \$1.1   |
| 2057  | \$2.2   | \$0.3   | \$4.2   | \$0.6   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$6.7   | \$1.0   |
| 2058  | \$1.9   | \$0.3   | \$4.1   | \$0.6   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$6.1   | \$0.9   |
| 2059  | \$1.6   | \$0.2   | \$3.9   | \$0.5   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$5.6   | \$0.8   |
| 2060  | \$1.3   | \$0.2   | \$3.3   | \$0.4   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$4.8   | \$0.6   |
| 2061  | \$1.4   | \$0.2   | \$2.6   | \$0.3   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$4.2   | \$0.5   |
| 2062  | \$1.2   | \$0.1   | \$2.2   | \$0.3   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$3.6   | \$0.4   |
| 2063  | \$0.9   | \$0.1   | \$1.9   | \$0.2   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.0 | \$3.0   | \$0.3   |
| 2064  | \$0.7   | \$0.1   | \$1.8   | \$0.2   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$2.6   | \$0.3   |
| 2065  | \$0.6   | \$0.1   | \$1.7   | \$0.2   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.0 | \$2.4   | \$0.2   |
| 2066  | \$0.6   | \$0.1   | \$1.5   | \$0.2   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$2.3   | \$0.2   |
| 2067  | \$0.6   | \$0.1   | \$1.3   | \$0.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.0 | \$1.9   | \$0.2   |
| 2068  | \$0.6   | \$0.1   | \$1.1   | \$0.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.2           | \$0.0 | \$1.8   | \$0.2   |
| 2069  | \$0.4   | \$0.0   | \$0.9   | \$0.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.0 | \$1.3   | \$0.1   |
| 2070  | \$0.2   | \$0.0   | \$0.8   | \$0.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.0 | \$1.1   | \$0.1   |
| 2071  | \$0.1   | \$0.0   | \$0.8   | \$0.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.0 | \$1.0   | \$0.1   |
| 2072  | \$0.1   | \$0.0   | \$0.8   | \$0.1   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.0 | \$0.9   | \$0.1   |
| 2073  | \$0.1   | \$0.0   | \$0.6   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.0 | \$0.8   | \$0.1   |
| 2074  | \$0.1   | \$0.0   | \$0.4   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.1           | \$0.0 | \$0.6   | \$0.0   |
| 2075  | \$0.1   | \$0.0   | \$0.3   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.4   | \$0.0   |
| 2076  | \$0.0   | \$0.0   | \$0.2   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.3   | \$0.0   |
| 2077  | \$0.1   | \$0.0   | \$0.2   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.3   | \$0.0   |
| 2078  | \$0.1   | \$0.0   | \$0.2   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.3   | \$0.0   |
| 2079  | \$0.0   | \$0.0   | \$0.1   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.2   | \$0.0   |
| 2080  | \$0.0   | \$0.0   | \$0.1   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.1   | \$0.0   |
| 2081  | \$0.0   | \$0.0   | \$0.1   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.1   | \$0.0   |
| 2082  | \$0.0   | \$0.0   | \$0.0   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.0   | \$0.0   |
| 2083  | \$0.0   | \$0.0   | \$0.0   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.0   | \$0.0   |
| 2084  | \$0.0   | \$0.0   | \$0.0   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.0   | \$0.0   |
| 2085  | \$0.0   | \$0.0   | \$0.0   | \$0.0   |                | \$0.0  |              | \$0.0  |                 | \$0.0 | \$0.0           | \$0.0 | \$0.0   | \$0.0   |

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**Appendix C: Summary of Claims Filed by Former NFL Players****Table C-1: Summary of Claims Filed by Former NFL Players<sup>1</sup>**

| <b>Category</b>    | <b>Disease/Impairment</b> |                   |            |                   |                 | <b>Total</b> |
|--------------------|---------------------------|-------------------|------------|-------------------|-----------------|--------------|
|                    | <b>Death w/CTE</b>        | <b>Alzheimers</b> | <b>ALS</b> | <b>Parkinsons</b> | <b>Dementia</b> |              |
| Self-Reported (SR) | 5                         | 11                | 1          | 1                 | 60              | 78           |
| Diagnosed (D)      | 11                        | 35                | 10         | 4                 | 101             | 161          |
| None               | -                         | -                 | -          | -                 | -               | 4,025        |
| <b>Total</b>       | <b>16</b>                 | <b>46</b>         | <b>11</b>  | <b>5</b>          | <b>161</b>      | <b>4264</b>  |

<sup>1</sup> Includes only those claims that were provided at the time of the analysis. Additional claims have been filed subsequently.

Notes: Self-Reported (SR) cases are those for which the filer identified diseases or impairments in their claim but did not have a medical diagnosis. Diagnosed (D) cases are those files that had a medical diagnosis for the diseases or impairments claimed. Some player's claims have more than one disease/impairment, and therefore could be counted in more than one disease category and therefore the total counts are greater than the number of claimants. Cases listed as Death with CTE represents those cases that were included on the list of CTE cases provided by Plaintiff representatives and were also included in the claims filed. In the model, only the cases of Alzheimer's, ALS, Parkinson's, and Dementia that had a medical diagnosis were used.

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## Appendix D: Examples of Life Cycle Modeling of Former NFL Players

The following pages present 14 different hypothetical cases to demonstrate how the life cycle model is applied. These hypothetical cases are:

1. Player diagnosed with Alzheimer's at age 52 who played 3 years.
2. Player diagnosed with Alzheimer's at age 63 who played 5 years.
3. Player who died of natural causes at the age of 77 who played 5 years.
4. Player diagnosed with ALS at age 44 who played 12 years.
5. Player diagnosed with Level 1.5 at 49 and Level 2 at 52 who played 4 years.
6. Player diagnosed with Level 1.5 at 55, progressing to Level 2 at 58, and progressing to Alzheimer's at 71 who played 9 years.
7. Player diagnosed with ALS at age 76 who played 6 years.
8. Player diagnosed with Alzheimer's at age 59 who played 2 years.
9. Player diagnosed with Level 1.5 at age 62, progressing to Level 2 at age 65 who played 5+ years.
10. Player diagnosed with Level 1.5 at age 72, progressing to Level 2 at 75 who played 6 years.
11. Player diagnosed with ALS at age 65 who played 3 years.
12. Player diagnosed with Alzheimer's at age 55 who played 2 years.
13. Player diagnosed with Parkinson's at age 50 who played 5+ years.
14. Player diagnosed with Parkinson's at age 68 who played 4 years.

|                            |             |
|----------------------------|-------------|
| Disease Diagnosed          | Alzheimer's |
| Age at Diagnosis           | 52          |
| Years played               | 3           |
| Year of Compensation       | 2022        |
| Total Nominal Compensation | \$1,147,289 |

| Year | Age | Natural Death | Incidence |         |             |             |           |
|------|-----|---------------|-----------|---------|-------------|-------------|-----------|
|      |     |               | ALS       | Suicide | Parkinson's | Alzheimer's | Level 1.5 |
| 2014 | 44  | 0.3350%       | 0.0115%   | 0.0433% | 0.0028%     | 0.0057%     | 0.0003%   |
| 2015 | 45  | 0.3630%       | 0.0118%   | 0.0475% | 0.0028%     | 0.0057%     | 0.0003%   |
| 2016 | 46  | 0.3920%       | 0.0129%   | 0.0521% | 0.0028%     | 0.0051%     | 0.0004%   |
| 2017 | 47  | 0.4180%       | 0.0129%   | 0.0571% | 0.0028%     | 0.0058%     | 0.0004%   |
| 2018 | 48  | 0.4380%       | 0.0129%   | 0.0626% | 0.0028%     | 0.0087%     | 0.0005%   |
| 2019 | 49  | 0.4570%       | 0.0130%   | 0.0687% | 0.0028%     | 0.0125%     | 0.0005%   |
| 2020 | 50  | 0.4780%       | 0.0129%   | 0.0753% | 0.0028%     | 0.0181%     | 0.0006%   |
| 2021 | 51  | 0.5040%       | 0.0132%   | 0.0825% | 0.0028%     | 0.0258%     | 0.0007%   |
| 2022 | 52  | 0.5380%       | 0.0127%   | 0.0905% | 0.0028%     | 0.0362%     | 0.0008%   |
| 2023 | 53  | 0.5800%       | 0.0133%   | 0.0992% | 0.0028%     | 0.0500%     | 0.0009%   |
| 2024 | 54  | 0.6320%       | 0.0125%   | 0.1088% | 0.0028%     | 0.0680%     | 0.0010%   |
| 2025 | 55  | 0.6910%       | 0.0122%   | 0.1193% | 0.0028%     | 0.0840%     | 0.0011%   |
| 2026 | 56  | 0.7570%       | 0.0133%   | 0.1308% | 0.0028%     | 0.0978%     | 0.0013%   |
| 2027 | 57  | 0.8280%       | 0.0123%   | 0.1435% | 0.0028%     | 0.1079%     | 0.0015%   |
| 2028 | 58  | 0.9060%       | 0.0123%   | 0.1573% | 0.0028%     | 0.1137%     | 0.0017%   |
| 2029 | 59  | 0.9910%       | 0.0122%   | 0.1725% | 0.0028%     | 0.1143%     | 0.0020%   |
| 2030 | 60  | 1.0860%       | 0.0113%   | 0.1891% | 0.0028%     | 0.1233%     | 0.0023%   |
| 2031 | 61  | 1.1920%       | 0.0104%   | 0.1982% | 0.0028%     | 0.1341%     | 0.0025%   |

# Life Cycle Modeling For Individual Former NFL Player

[illegible]

|                            |             |
|----------------------------|-------------|
| Disease Diagnosed          | Alzheimer's |
| Age at Diagnosis           | 63          |
| Years played               | 5           |
| Year of Compensation       | 2033        |
| Total Nominal Compensation | \$1,313,577 |

# Life Cycle Modeling For Individual Former NFL Player

| Outcome       |     |         |                         |                       |                            |
|---------------|-----|---------|-------------------------|-----------------------|----------------------------|
| Natural Death | ALS | Suicide | Parkinson's Alzheimer's | Level 2/<br>Level 1.5 | Adverse Diagnosis<br>(Y/N) |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         |                         |                       | N                          |
|               |     |         | X                       |                       | Y                          |
| Y             |     |         |                         |                       | N                          |
|               |     |         |                         |                       | Deceased                   |

| Nominal Compensation | Comments              |
|----------------------|-----------------------|
|                      |                       |
|                      |                       |
|                      |                       |
|                      |                       |
|                      |                       |
|                      |                       |
|                      |                       |
|                      |                       |
|                      |                       |
|                      |                       |
|                      |                       |
|                      |                       |
| \$1,313,577          | Alzheimer's Diagnosed |
|                      | Blauwe Deceased       |

### Hypothetical Player Case Profile #3

|                            |               |
|----------------------------|---------------|
| Disease Diagnosed          | Natural Death |
| Age at Diagnosis           | 77            |
| Years played               | 5             |
| Year of Compensation       | 2053          |
| Total Nominal Compensation | \$0           |

Life Cycle Modeling For Individual Former NFL Player

|      |     | Incidence |         |         |                                   |                                   | Outcome |         |                                   |         |          |                                  |
|------|-----|-----------|---------|---------|-----------------------------------|-----------------------------------|---------|---------|-----------------------------------|---------|----------|----------------------------------|
|      |     | Natural   |         | Adverse |                                   | Parkinson's Alzheimer's Level 1.5 | ALS     | Suicide | Parkinson's Alzheimer's Level 1.5 | Adverse | Level 2/ | Diagnosis                        |
| Year | Age | Death     | ALS     | Suicide | Parkinson's Alzheimer's Level 1.5 |                                   |         |         |                                   |         |          |                                  |
| 2014 | 44  | 0.3350%   | 0.0115% | 0.0433% | 0.0028%                           | 0.0057%                           | 0.0003% |         |                                   |         |          | N                                |
| 2015 | 45  | 0.3630%   | 0.0118% | 0.0475% | 0.0028%                           | 0.0057%                           | 0.0003% |         |                                   |         |          | N                                |
| 2016 | 46  | 0.3920%   | 0.0129% | 0.0511% | 0.0028%                           | 0.0051%                           | 0.0004% |         |                                   |         |          | N                                |
| 2017 | 47  | 0.4180%   | 0.0120% | 0.0571% | 0.0028%                           | 0.0058%                           | 0.0004% |         |                                   |         |          | N                                |
| 2018 | 48  | 0.4380%   | 0.0129% | 0.0626% | 0.0028%                           | 0.0087%                           | 0.0005% |         |                                   |         |          | N                                |
| 2019 | 49  | 0.4570%   | 0.0130% | 0.0687% | 0.0028%                           | 0.0125%                           | 0.0005% |         |                                   |         |          | N                                |
| 2020 | 50  | 0.4780%   | 0.0128% | 0.0753% | 0.0028%                           | 0.0181%                           | 0.0006% |         |                                   |         |          | N                                |
| 2021 | 51  | 0.5040%   | 0.0124% | 0.0825% | 0.0028%                           | 0.0258%                           | 0.0007% |         |                                   |         |          | N                                |
| 2022 | 52  | 0.5380%   | 0.0127% | 0.0905% | 0.0028%                           | 0.0362%                           | 0.0008% |         |                                   |         |          | N                                |
| 2023 | 53  | 0.5800%   | 0.0133% | 0.0992% | 0.0028%                           | 0.0500%                           | 0.0009% |         |                                   |         |          | N                                |
| 2024 | 54  | 0.6320%   | 0.0125% | 0.1088% | 0.0028%                           | 0.0680%                           | 0.0010% |         |                                   |         |          | N                                |
| 2025 | 55  | 0.6910%   | 0.0122% | 0.1193% | 0.0028%                           | 0.0840%                           | 0.0011% |         |                                   |         |          | N                                |
| 2026 | 56  | 0.7570%   | 0.0133% | 0.1308% | 0.0028%                           | 0.0978%                           | 0.0013% |         |                                   |         |          | N                                |
| 2027 | 57  | 0.8280%   | 0.0123% | 0.1435% | 0.0028%                           | 0.1079%                           | 0.0015% |         |                                   |         |          | N                                |
| 2028 | 58  | 0.9060%   | 0.0123% | 0.1573% | 0.0028%                           | 0.1137%                           | 0.0017% |         |                                   |         |          | N                                |
| 2029 | 59  | 0.9910%   | 0.0122% | 0.1725% | 0.0028%                           | 0.1145%                           | 0.0020% |         |                                   |         |          | N                                |
| 2030 | 60  | 1.0860%   | 0.0113% | 0.1871% | 0.0028%                           | 0.1233%                           | 0.0023% |         |                                   |         |          | N                                |
| 2031 | 61  | 1.1920%   | 0.0104% | 0.1982% | 0.0028%                           | 0.1341%                           | 0.0025% |         |                                   |         |          | N                                |
| 2032 | 62  | 1.3110%   | 0.0095% | 0.2082% | 0.0028%                           | 0.1577%                           | 0.0028% |         |                                   |         |          | N                                |
| 2033 | 63  | 1.4440%   | 0.0102% | 0.2122% | 0.0028%                           | 0.1989%                           | 0.0030% |         |                                   |         |          | N                                |
| 2034 | 64  | 1.5900%   | 0.0102% | 0.2312% | 0.0028%                           | 0.2643%                           | 0.0033% |         |                                   |         |          | N                                |
| 2035 | 65  | 1.7530%   | 0.0095% | 0.2444% | 0.0028%                           | 0.3320%                           | 0.0036% |         |                                   |         |          | N                                |
| 2036 | 66  | 1.9320%   | 0.0097% | 0.2589% | 0.0028%                           | 0.4022%                           | 0.0039% |         |                                   |         |          | N                                |
| 2037 | 67  | 2.1220%   | 0.0097% | 0.2747% | 0.0028%                           | 0.4674%                           | 0.0042% |         |                                   |         |          | N                                |
| 2038 | 68  | 2.3230%   | 0.0102% | 0.2921% | 0.0028%                           | 0.5224%                           | 0.0046% |         |                                   |         |          | N                                |
| 2039 | 69  | 2.5380%   | 0.0097% | 0.3112% | 0.0028%                           | 0.5679%                           | 0.0049% |         |                                   |         |          | N                                |
| 2040 | 70  | 2.7650%   | 0.0098% | 0.3321% | 0.0028%                           | 0.6032%                           | 0.0053% |         |                                   |         |          | N                                |
| 2041 | 71  | 3.0590%   | 0.0101% | 0.3799% | 0.0028%                           | 0.6409%                           | 0.0058% |         |                                   |         |          | N                                |
| 2042 | 72  | 3.4300%   | 0.0105% | 0.4232% | 0.0028%                           | 0.7023%                           | 0.0063% |         |                                   |         |          | N                                |
| 2043 | 73  | 3.6330%   | 0.0107% | 0.4811% | 0.0028%                           | 0.7932%                           | 0.0069% |         |                                   |         |          | N                                |
| 2044 | 74  | 3.9420%   | 0.0117% | 0.5493% | 0.0028%                           | 0.9205%                           | 0.0075% |         |                                   |         |          | N                                |
| 2045 | 75  | 4.2990%   | 0.0123% | 0.6255% | 0.0028%                           | 1.0630%                           | 0.0082% |         |                                   |         |          | N                                |
| 2046 | 76  | 4.7150%   | 0.0126% | 0.7238% | 0.0028%                           | 1.2215%                           | 0.0084% |         |                                   |         |          | N                                |
| 2047 | 77  | 5.1840%   | 0.0132% | 0.8347% | 0.0028%                           | 1.3765%                           | 0.0086% |         |                                   |         |          | N                                |
| 2048 | 78  | 5.7110%   | 0.0110% | 0.9652% | 0.0028%                           | 1.5332%                           | 0.0089% |         |                                   |         |          | N                                |
| 2049 | 79  | 6.3050%   | 0.0131% | 1.1187% | 0.0028%                           | 1.6889%                           | 0.0091% |         |                                   |         |          | N                                |
| 2050 | 80  | 6.9780%   | 0.0139% | 1.2993% | 0.0028%                           | 1.8569%                           | 0.0094% |         |                                   |         |          | N                                |
| 2051 | 81  | 7.7380%   | 0.0155% | 1.4467% | 0.0028%                           | 2.0369%                           | 0.0096% |         |                                   |         |          | N                                |
| 2052 | 82  | 8.5960%   | 0.0152% | 1.6123% | 0.0028%                           | 2.2402%                           | 0.0099% |         |                                   |         |          | N                                |
| 2053 | 83  | 9.5570%   | 0.0137% | 1.7980% | 0.0028%                           | 2.5351%                           | 0.0101% |         |                                   |         |          | N                                |
|      |     | X         |         |         |                                   |                                   |         |         |                                   |         |          | Deceased                         |
|      |     |           |         |         |                                   |                                   |         |         |                                   | 0       |          | Player Deceased - Natural Causes |

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Hypothetical Player Case Profile #4

|                            |             |
|----------------------------|-------------|
| Disease Diagnosed          | ALS         |
| Age at Diagnosis           | 44          |
| Years played               | 12          |
| Year of Compensation       | 2014        |
| Total Nominal Compensation | \$5,100,000 |

Life Cycle Modeling For Individual Former NFL Player

| Incidence |     |         |                         |         |             |           |          |           |              | Outcome                   |  |  |  |  |
|-----------|-----|---------|-------------------------|---------|-------------|-----------|----------|-----------|--------------|---------------------------|--|--|--|--|
| Natural   |     |         | Parkinson's Alzheimer's |         |             |           |          | Adverse   |              |                           |  |  |  |  |
| Year      | Age | Death   | ALS                     | Suicide | Alzheimer's | Level 1.5 | Level 2/ | Diagnosis | Nominal      | Comments                  |  |  |  |  |
|           |     |         |                         |         |             |           |          | (Y/N)     | Compensation |                           |  |  |  |  |
| 2014      | 44  | 0.3350% | 0.0115%                 | 0.0433% | 0.0028%     | 0.0057%   |          | Y         | \$ 5,100,000 | Player diagnosed with ALS |  |  |  |  |
| 2015      | 45  | 0.3630% | 0.0118%                 | 0.0475% | 0.0028%     | 0.0057%   |          | N         |              |                           |  |  |  |  |
| 2016      | 46  | 0.3920% | 0.0129%                 | 0.0521% | 0.0028%     | 0.0051%   |          | N         |              |                           |  |  |  |  |
| 2017      | 47  | 0.4180% | 0.0120%                 | 0.0571% | 0.0028%     | 0.0058%   |          | N         |              |                           |  |  |  |  |
| 2018      | 48  | 0.4380% | 0.0129%                 | 0.0626% | 0.0028%     | 0.0087%   |          | N         |              |                           |  |  |  |  |
| 2019      | 49  | 0.4570% | 0.0130%                 | 0.0687% | 0.0028%     | 0.0125%   |          | N         |              |                           |  |  |  |  |
| 2020      | 50  | 0.4780% | 0.0122%                 | 0.0753% | 0.0028%     | 0.0181%   |          | N         |              |                           |  |  |  |  |
| 2021      | 51  | 0.5040% | 0.0132%                 | 0.0825% | 0.0028%     | 0.0258%   |          | N         |              |                           |  |  |  |  |
| 2022      | 52  | 0.5380% | 0.0127%                 | 0.0905% | 0.0028%     | 0.0362%   |          | N         |              |                           |  |  |  |  |
| 2023      | 53  | 0.5800% | 0.0133%                 | 0.0992% | 0.0028%     | 0.0500%   |          | N         |              |                           |  |  |  |  |
| 2024      | 54  | 0.6320% | 0.0125%                 | 0.1088% | 0.0028%     | 0.0680%   |          | N         |              |                           |  |  |  |  |
| 2025      | 55  | 0.6910% | 0.0122%                 | 0.1193% | 0.0028%     | 0.0840%   |          | N         |              |                           |  |  |  |  |
| 2026      | 56  | 0.7570% | 0.0133%                 | 0.1308% | 0.0028%     | 0.0978%   |          | N         |              |                           |  |  |  |  |
| 2027      | 57  | 0.8280% | 0.0123%                 | 0.1435% | 0.0028%     | 0.1079%   |          | N         |              |                           |  |  |  |  |
|           |     |         |                         |         |             |           |          | Deceased  |              | Player Deceased           |  |  |  |  |

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Hypothetical Player Case Profile #5

|                            |               |
|----------------------------|---------------|
| Disease Diagnosed          | Level 1.5 & 2 |
| Age at Diagnosis           | 49, 52        |
| Years played               | 4             |
| Year of Compensation       | 2019, 2022    |
| Total Nominal Compensation | \$1,147,289   |

Life Cycle Modeling For Individual Former NFL Player

| Incidence |     |               |         |         |             |             |           |               |     | Outcome |             |             |           |                   |
|-----------|-----|---------------|---------|---------|-------------|-------------|-----------|---------------|-----|---------|-------------|-------------|-----------|-------------------|
| Year      | Age | Natural Death | ALS     | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Natural Death | ALS | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Adverse Diagnosis |
|           |     |               |         |         |             |             |           |               |     |         |             |             |           |                   |
| 2014      | 44  | 0.3350%       | 0.0115% | 0.0433% | 0.0028%     | 0.0057%     | 0.0003%   |               |     |         |             |             |           | N                 |
| 2015      | 45  | 0.3630%       | 0.0118% | 0.0475% | 0.0028%     | 0.0057%     | 0.0003%   |               |     |         |             |             |           | N                 |
| 2016      | 46  | 0.3920%       | 0.0129% | 0.0521% | 0.0028%     | 0.0051%     | 0.0004%   |               |     |         |             |             |           | N                 |
| 2017      | 47  | 0.4180%       | 0.0120% | 0.0571% | 0.0028%     | 0.0058%     | 0.0004%   |               |     |         |             |             |           | N                 |
| 2018      | 48  | 0.4380%       | 0.0129% | 0.0626% | 0.0028%     | 0.0087%     | 0.0005%   |               |     |         |             |             |           | N                 |
| 2019      | 49  | 0.4570%       | 0.0130% | 0.0687% | 0.0028%     | 0.0125%     | 0.0005%   |               |     |         |             | X           |           | Y                 |
| 2020      | 50  | 0.4780%       | 0.0122% | 0.0753% | 0.0028%     | 0.0181%     | 0.0006%   |               |     |         |             |             |           | N                 |
| 2021      | 51  | 0.5040%       | 0.0132% | 0.0825% | 0.0028%     | 0.0258%     | 0.0007%   |               |     |         |             |             |           | N                 |
| 2022      | 52  | 0.5380%       | 0.0127% | 0.0905% | 0.0028%     | 0.0362%     | 0.0008%   |               |     |         |             | X           |           | Y                 |
| 2023      | 53  | 0.5800%       | 0.0133% | 0.0992% | 0.0028%     | 0.0500%     | 0.0009%   |               |     |         |             |             |           | N                 |
| 2024      | 54  | 0.6320%       | 0.0125% | 0.1088% | 0.0028%     | 0.0680%     | 0.0010%   |               |     |         |             |             |           | N                 |
| 2025      | 55  | 0.6910%       | 0.0122% | 0.1193% | 0.0028%     | 0.0840%     | 0.0011%   |               |     |         |             |             |           | N                 |
| 2026      | 56  | 0.7570%       | 0.0133% | 0.1308% | 0.0028%     | 0.0978%     | 0.0013%   |               |     |         |             |             |           | N                 |
| 2027      | 57  | 0.8280%       | 0.0123% | 0.1435% | 0.0028%     | 0.1079%     | 0.0015%   |               |     |         |             |             |           | N                 |
| 2028      | 58  | 0.9060%       | 0.0123% | 0.1573% | 0.0028%     | 0.1137%     | 0.0017%   |               |     |         |             |             |           | N                 |
| 2029      | 59  | 0.9910%       | 0.0122% | 0.1725% | 0.0028%     | 0.1143%     | 0.0020%   |               |     |         |             |             |           | N                 |
| 2030      | 60  | 1.0860%       | 0.0113% | 0.1891% | 0.0028%     | 0.1233%     | 0.0023%   |               |     |         |             |             |           | N                 |
| 2031      | 61  | 1.1920%       | 0.0104% | 0.1982% | 0.0028%     | 0.1341%     | 0.0025%   |               |     |         |             |             |           | N                 |
| 2032      | 62  | 1.3110%       | 0.0095% | 0.2082% | 0.0028%     | 0.1577%     | 0.0028%   |               |     |         |             |             |           | N                 |
| 2033      | 63  | 1.4440%       | 0.0102% | 0.2192% | 0.0028%     | 0.1989%     | 0.0030%   |               |     |         |             |             |           | N                 |
| 2034      | 64  | 1.5900%       | 0.0102% | 0.2312% | 0.0028%     | 0.2643%     | 0.0033%   |               |     |         |             |             |           | N                 |
| 2035      | 65  | 1.7530%       | 0.0095% | 0.2444% | 0.0028%     | 0.3320%     | 0.0036%   |               |     |         |             |             |           | N                 |
| 2036      | 66  | 1.9320%       | 0.0097% | 0.2589% | 0.0028%     | 0.4022%     | 0.0039%   |               |     |         |             |             |           | N                 |
| 2037      | 67  | 2.1220%       | 0.0087% | 0.2747% | 0.0028%     | 0.4674%     | 0.0042%   |               |     |         |             |             |           | N                 |
| 2038      | 68  | 2.3230%       | 0.0102% | 0.2921% | 0.0028%     | 0.5224%     | 0.0046%   |               |     |         |             |             |           | N                 |
| 2039      | 69  | 2.5380%       | 0.0097% | 0.3112% | 0.0028%     | 0.5629%     | 0.0049%   |               |     |         |             |             |           | N                 |
| 2040      | 70  | 2.7850%       | 0.0098% | 0.3321% | 0.0028%     | 0.6032%     | 0.0053%   |               |     |         |             |             |           | N                 |
| 2041      | 71  | 3.0590%       | 0.0101% | 0.3739% | 0.0028%     | 0.6409%     | 0.0058%   |               |     |         |             |             |           | N                 |
| 2042      | 72  | 3.3430%       | 0.0105% | 0.4232% | 0.0028%     | 0.7023%     | 0.0063%   |               |     |         |             |             |           | N                 |
| 2043      | 73  | 3.6330%       | 0.0107% | 0.4811% | 0.0028%     | 0.7932%     | 0.0069%   |               |     |         |             |             |           | N                 |
| 2044      | 74  | 3.9420%       | 0.0117% | 0.5493% | 0.0028%     | 0.9205%     | 0.0075%   |               |     |         |             |             |           | N                 |
| 2045      | 75  | 4.2990%       | 0.0123% | 0.6295% | 0.0028%     | 1.0630%     | 0.0082%   |               |     |         |             |             |           | Deceased          |

|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|



Privileged and Confidential

### Hypothetical Player Case Profile #6

| Disease Diagnosed          | Level 2 & Alzheimer's |
|----------------------------|-----------------------|
| Age at Diagnosis           | 55, 58, 71            |
| Years played               | 9                     |
| Year of Compensation       | 2025, 2028, 2041      |
| Total Nominal Compensation | \$1,178,981           |

Life Cycle Modeling For Individual Former NFL Player

| Incidence |     |               |         |         |             |             |           |               |     | Outcome |             |             |           |                         | Nominal Compensation | Comments                          |
|-----------|-----|---------------|---------|---------|-------------|-------------|-----------|---------------|-----|---------|-------------|-------------|-----------|-------------------------|----------------------|-----------------------------------|
| Year      | Age | Natural Death | ALS     | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Natural Death | ALS | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Adverse Diagnosis (Y/N) |                      |                                   |
| 2014      | 44  | 0.3350%       | 0.0115% | 0.0433% | 0.0028%     | 0.0057%     | 0.0003%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2015      | 45  | 0.3630%       | 0.0118% | 0.0475% | 0.0028%     | 0.0057%     | 0.0003%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2016      | 46  | 0.3920%       | 0.0129% | 0.0521% | 0.0028%     | 0.0051%     | 0.0004%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2017      | 47  | 0.4180%       | 0.0120% | 0.0571% | 0.0028%     | 0.0058%     | 0.0004%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2018      | 48  | 0.4380%       | 0.0129% | 0.0626% | 0.0028%     | 0.0067%     | 0.0005%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2019      | 49  | 0.4570%       | 0.0130% | 0.0687% | 0.0028%     | 0.0125%     | 0.0005%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2020      | 50  | 0.4780%       | 0.0122% | 0.0753% | 0.0028%     | 0.0161%     | 0.0006%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2021      | 51  | 0.5040%       | 0.0122% | 0.0825% | 0.0028%     | 0.0258%     | 0.0007%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2022      | 52  | 0.5380%       | 0.0127% | 0.0905% | 0.0028%     | 0.0362%     | 0.0008%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2023      | 53  | 0.5800%       | 0.0133% | 0.0992% | 0.0028%     | 0.0500%     | 0.0009%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2024      | 54  | 0.6320%       | 0.0125% | 0.1088% | 0.0028%     | 0.0680%     | 0.0010%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2025      | 55  | 0.6910%       | 0.0122% | 0.1195% | 0.0028%     | 0.0840%     | 0.0011%   |               |     |         |             |             | X         | Y                       | \$665,827            | Player diagnosed with Level 1.5   |
| 2026      | 56  | 0.7570%       | 0.0133% | 0.1308% | 0.0028%     | 0.0978%     | 0.0013%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2027      | 57  | 0.8280%       | 0.0123% | 0.1435% | 0.0028%     | 0.1079%     | 0.0015%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2028      | 58  | 0.9060%       | 0.0123% | 0.1573% | 0.0028%     | 0.1137%     | 0.0017%   |               |     |         |             |             | X         | Y                       | \$513,154            | Player diagnosed with Level 2.0   |
| 2029      | 59  | 0.9910%       | 0.0122% | 0.1725% | 0.0028%     | 0.1143%     | 0.0020%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2030      | 60  | 1.0860%       | 0.0113% | 0.1891% | 0.0028%     | 0.1233%     | 0.0023%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2031      | 61  | 1.1920%       | 0.0104% | 0.1982% | 0.0028%     | 0.1341%     | 0.0025%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2032      | 62  | 1.3110%       | 0.0095% | 0.2082% | 0.0028%     | 0.1577%     | 0.0028%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2033      | 63  | 1.4440%       | 0.0102% | 0.2192% | 0.0028%     | 0.1989%     | 0.0030%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2034      | 64  | 1.5900%       | 0.0102% | 0.2312% | 0.0028%     | 0.2643%     | 0.0033%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2035      | 65  | 1.7530%       | 0.0095% | 0.2444% | 0.0028%     | 0.3320%     | 0.0036%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2036      | 66  | 1.9320%       | 0.0097% | 0.2589% | 0.0028%     | 0.4022%     | 0.0039%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2037      | 67  | 2.1220%       | 0.0087% | 0.2747% | 0.0028%     | 0.4674%     | 0.0042%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2038      | 68  | 2.3230%       | 0.0102% | 0.2921% | 0.0028%     | 0.5224%     | 0.0046%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2039      | 69  | 2.5380%       | 0.0097% | 0.3112% | 0.0028%     | 0.5629%     | 0.0049%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2040      | 70  | 2.7850%       | 0.0098% | 0.3321% | 0.0028%     | 0.6032%     | 0.0053%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2041      | 71  | 3.0590%       | 0.0101% | 0.3759% | 0.0028%     | 0.6409%     | 0.0058%   |               |     |         |             | X           |           | Y                       | \$0                  | Player diagnosed with Alzheimer's |
| 2042      | 72  | 3.3430%       | 0.0105% | 0.4232% | 0.0028%     | 0.7023%     | 0.0063%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2043      | 73  | 3.6330%       | 0.0107% | 0.4811% | 0.0028%     | 0.7932%     | 0.0069%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2044      | 74  | 3.9420%       | 0.0117% | 0.5493% | 0.0028%     | 0.9205%     | 0.0075%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2045      | 75  | 4.2990%       | 0.0123% | 0.6295% | 0.0028%     | 1.0630%     | 0.0082%   |               |     |         |             |             |           | N                       |                      |                                   |
| 2046      | 76  | 4.7150%       | 0.0126% | 0.7238% | 0.0028%     | 1.2215%     | 0.0084%   |               |     |         |             |             |           | Deceased                |                      | Player deceased                   |

Hypothetical Player Case Profile #7

|                            |             |
|----------------------------|-------------|
| Disease Diagnosed          | ALS         |
| Age at Diagnosis           | 76          |
| Years played               | 6           |
| Year of Compensational     | 2046        |
| Total Nominal Compensation | \$2,210,566 |

Life Cycle Modeling For Individual Former NFL Player

| Incidence |     |         |         |         |             |             |           |       |     | Outcome |             |             |           |           |                           |
|-----------|-----|---------|---------|---------|-------------|-------------|-----------|-------|-----|---------|-------------|-------------|-----------|-----------|---------------------------|
| Natural   |     |         |         |         | Natural     |             |           |       |     | Adverse |             |             |           |           |                           |
| Year      | Age | Death   | ALS     | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Death | ALS | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Diagnosis |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           | (Y/N)     |                           |
| 2014      | 44  | 0.3350% | 0.0115% | 0.0433% | 0.0028%     | 0.0057%     | 0.0003%   |       |     |         |             |             |           | N         |                           |
| 2015      | 45  | 0.3630% | 0.0118% | 0.0475% | 0.0028%     | 0.0057%     | 0.0003%   |       |     |         |             |             |           | N         |                           |
| 2016      | 46  | 0.3920% | 0.0129% | 0.0521% | 0.0028%     | 0.0051%     | 0.0004%   |       |     |         |             |             |           | N         |                           |
| 2017      | 47  | 0.4180% | 0.0120% | 0.0571% | 0.0028%     | 0.0058%     | 0.0004%   |       |     |         |             |             |           | N         |                           |
| 2018      | 48  | 0.4380% | 0.0129% | 0.0626% | 0.0028%     | 0.0087%     | 0.0005%   |       |     |         |             |             |           | N         |                           |
| 2019      | 49  | 0.4570% | 0.0130% | 0.0687% | 0.0028%     | 0.0125%     | 0.0005%   |       |     |         |             |             |           | N         |                           |
| 2020      | 50  | 0.4780% | 0.0122% | 0.0753% | 0.0028%     | 0.0181%     | 0.0006%   |       |     |         |             |             |           | N         |                           |
| 2021      | 51  | 0.5040% | 0.0132% | 0.0825% | 0.0028%     | 0.0258%     | 0.0007%   |       |     |         |             |             |           | N         |                           |
| 2022      | 52  | 0.5380% | 0.0127% | 0.0905% | 0.0028%     | 0.0362%     | 0.0008%   |       |     |         |             |             |           | N         |                           |
| 2023      | 53  | 0.5800% | 0.0133% | 0.0992% | 0.0028%     | 0.0500%     | 0.0009%   |       |     |         |             |             |           | N         |                           |
| 2024      | 54  | 0.6320% | 0.0125% | 0.1088% | 0.0028%     | 0.0680%     | 0.0010%   |       |     |         |             |             |           | N         |                           |
| 2025      | 55  | 0.6910% | 0.0122% | 0.1193% | 0.0028%     | 0.0840%     | 0.0011%   |       |     |         |             |             |           | N         |                           |
| 2026      | 56  | 0.7570% | 0.0133% | 0.1308% | 0.0028%     | 0.0978%     | 0.0013%   |       |     |         |             |             |           | N         |                           |
| 2027      | 57  | 0.8280% | 0.0123% | 0.1435% | 0.0028%     | 0.1079%     | 0.0015%   |       |     |         |             |             |           | N         |                           |
| 2028      | 58  | 0.9060% | 0.0123% | 0.1573% | 0.0028%     | 0.1137%     | 0.0017%   |       |     |         |             |             |           | N         |                           |
| 2029      | 59  | 0.9910% | 0.0122% | 0.1725% | 0.0028%     | 0.1143%     | 0.0020%   |       |     |         |             |             |           | N         |                           |
| 2030      | 60  | 1.0860% | 0.0113% | 0.1891% | 0.0028%     | 0.1233%     | 0.0023%   |       |     |         |             |             |           | N         |                           |
| 2031      | 61  | 1.1920% | 0.0104% | 0.1982% | 0.0028%     | 0.1341%     | 0.0025%   |       |     |         |             |             |           | N         |                           |
| 2032      | 62  | 1.3110% | 0.0095% | 0.2082% | 0.0028%     | 0.1577%     | 0.0028%   |       |     |         |             |             |           | N         |                           |
| 2033      | 63  | 1.4440% | 0.0102% | 0.2192% | 0.0028%     | 0.1989%     | 0.0030%   |       |     |         |             |             |           | N         |                           |
| 2034      | 64  | 1.5900% | 0.0102% | 0.2312% | 0.0028%     | 0.2643%     | 0.0033%   |       |     |         |             |             |           | N         |                           |
| 2035      | 65  | 1.7530% | 0.0095% | 0.2444% | 0.0028%     | 0.3320%     | 0.0036%   |       |     |         |             |             |           | N         |                           |
| 2036      | 66  | 1.9320% | 0.0097% | 0.2589% | 0.0028%     | 0.4072%     | 0.0039%   |       |     |         |             |             |           | N         |                           |
| 2037      | 67  | 2.1220% | 0.0087% | 0.2747% | 0.0028%     | 0.4674%     | 0.0042%   |       |     |         |             |             |           | N         |                           |
| 2038      | 68  | 2.3230% | 0.0102% | 0.2921% | 0.0028%     | 0.5224%     | 0.0046%   |       |     |         |             |             |           | N         |                           |
| 2039      | 69  | 2.5380% | 0.0097% | 0.3112% | 0.0028%     | 0.5629%     | 0.0049%   |       |     |         |             |             |           | N         |                           |
| 2040      | 70  | 2.7850% | 0.0098% | 0.3321% | 0.0028%     | 0.6032%     | 0.0053%   |       |     |         |             |             |           | N         |                           |
| 2041      | 71  | 3.0590% | 0.0101% | 0.3739% | 0.0028%     | 0.6409%     | 0.0058%   |       |     |         |             |             |           | N         |                           |
| 2042      | 72  | 3.3430% | 0.0105% | 0.4232% | 0.0028%     | 0.7023%     | 0.0063%   |       |     |         |             |             |           | N         |                           |
| 2043      | 73  | 3.6330% | 0.0107% | 0.4811% | 0.0028%     | 0.7932%     | 0.0069%   |       |     |         |             |             |           | N         |                           |
| 2044      | 74  | 3.9420% | 0.0117% | 0.5493% | 0.0028%     | 0.9205%     | 0.0075%   |       |     |         |             |             |           | N         |                           |
| 2045      | 75  | 4.2990% | 0.0123% | 0.6295% | 0.0028%     | 1.0630%     | 0.0082%   |       |     |         |             |             |           | N         |                           |
| 2046      | 76  | 4.7150% | 0.0126% | 0.7238% | 0.0028%     | 1.2215%     | 0.0084%   |       | X   |         |             |             |           | Y         |                           |
| 2047      | 77  | 5.1840% | 0.0132% | 0.8347% | 0.0028%     | 1.3765%     | 0.0086%   |       |     |         |             |             |           | N         |                           |
| 2048      | 78  | 5.7110% | 0.0131% | 0.9652% | 0.0028%     | 1.5332%     | 0.0089%   |       |     |         |             |             |           | N         |                           |
| 2049      | 79  | 6.3050% | 0.0131% | 1.1187% | 0.0028%     | 1.6889%     | 0.0091%   |       |     |         |             |             |           | N         |                           |
| 2050      | 80  | 6.9780% | 0.0139% | 1.2993% | 0.0028%     | 1.8569%     | 0.0094%   |       |     |         |             |             |           | N         |                           |
| 2051      | 81  | 7.7380% | 0.0155% | 1.4467% | 0.0028%     | 2.0369%     | 0.0096%   |       |     |         |             |             |           | N         |                           |
| 2052      | 82  | 8.5960% | 0.0152% | 1.6123% | 0.0028%     | 2.2602%     | 0.0095%   |       |     |         |             |             |           | Deceased  |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           | Player diagnosed with ALS |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           | \$2,210,566               |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
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|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |
|           |     |         |         |         |             |             |           |       |     |         |             |             |           |           |                           |

Privileged and Confidential

### Hypothetical Player Case Profile #8

|                            |             |
|----------------------------|-------------|
| Disease Diagnosed          | Alzheimer's |
| Age at Diagnosis           | 59          |
| Years played               | 2           |
| Year of Compensation       | 2029        |
| Total Nominal Compensation | \$587,552   |

Life Cycle Modeling For Individual Former NFL Player

| Incidence |     |               |         |         |             |             |           |                   |          | Outcome       |     |         |             |             | Nominal Compensation | Comments                          |
|-----------|-----|---------------|---------|---------|-------------|-------------|-----------|-------------------|----------|---------------|-----|---------|-------------|-------------|----------------------|-----------------------------------|
| Year      | Age | Natural Death | ALS     | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Adverse Diagnosis | Level 2/ | Natural Death | ALS | Suicide | Parkinson's | Alzheimer's |                      |                                   |
| 2014      | 44  | 0.3350%       | 0.0115% | 0.0433% | 0.0028%     | 0.0057%     | 0.0003%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2015      | 45  | 0.3630%       | 0.0118% | 0.0475% | 0.0028%     | 0.0057%     | 0.0003%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2016      | 46  | 0.3920%       | 0.0129% | 0.0521% | 0.0028%     | 0.0051%     | 0.0004%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2017      | 47  | 0.4180%       | 0.0120% | 0.0571% | 0.0028%     | 0.0058%     | 0.0004%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2018      | 48  | 0.4380%       | 0.0129% | 0.0626% | 0.0028%     | 0.0087%     | 0.0005%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2019      | 49  | 0.4570%       | 0.0130% | 0.0687% | 0.0028%     | 0.0125%     | 0.0005%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2020      | 50  | 0.4780%       | 0.0122% | 0.0753% | 0.0028%     | 0.0181%     | 0.0006%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2021      | 51  | 0.5040%       | 0.0132% | 0.0825% | 0.0028%     | 0.0258%     | 0.0007%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2022      | 52  | 0.5380%       | 0.0127% | 0.0905% | 0.0028%     | 0.0362%     | 0.0008%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2023      | 53  | 0.5800%       | 0.0135% | 0.0992% | 0.0028%     | 0.0500%     | 0.0009%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2024      | 54  | 0.6320%       | 0.0125% | 0.1088% | 0.0028%     | 0.0680%     | 0.0010%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2025      | 55  | 0.6910%       | 0.0122% | 0.1193% | 0.0028%     | 0.0840%     | 0.0011%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2026      | 56  | 0.7570%       | 0.0133% | 0.1308% | 0.0028%     | 0.0978%     | 0.0013%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2027      | 57  | 0.8280%       | 0.0123% | 0.1435% | 0.0028%     | 0.1079%     | 0.0015%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2028      | 58  | 0.9060%       | 0.0123% | 0.1573% | 0.0028%     | 0.1137%     | 0.0017%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2029      | 59  | 0.9910%       | 0.0122% | 0.1725% | 0.0028%     | 0.1143%     | 0.0020%   | Y                 | X        |               |     |         |             |             | \$587,552            | Player diagnosed with Alzheimer's |
| 2030      | 60  | 1.0860%       | 0.0113% | 0.1891% | 0.0028%     | 0.1233%     | 0.0023%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2031      | 61  | 1.1920%       | 0.0104% | 0.1982% | 0.0028%     | 0.1341%     | 0.0025%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2032      | 62  | 1.3110%       | 0.0095% | 0.2082% | 0.0028%     | 0.1577%     | 0.0028%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2033      | 63  | 1.4440%       | 0.0102% | 0.2192% | 0.0028%     | 0.1989%     | 0.0030%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2034      | 64  | 1.5900%       | 0.0102% | 0.2312% | 0.0028%     | 0.2643%     | 0.0033%   | N                 |          |               |     |         |             |             |                      |                                   |
| 2035      | 65  | 1.7530%       | 0.0095% | 0.2444% | 0.0028%     | 0.3320%     | 0.0036%   | Deceased          |          |               |     |         |             |             |                      | Player deceased                   |

## Hypothetical Player Case Profile #9

|                            |               |
|----------------------------|---------------|
| Disease Diagnosed          | Level 1.5 & 2 |
| Age at Diagnosis           | 62, 65        |
| Years played               | 5+            |
| Year of Compensation       | 2032, 2035    |
| Total Nominal Compensation | \$710,996     |

# Life Cycle Modeling For Individual Former NFL Player

| Incidence |     |           |           | Outcome   |             |             |         |
|-----------|-----|-----------|-----------|-----------|-------------|-------------|---------|
| Year      | Age | Natural   |           | Natural   |             |             | Adverse |
|           |     | Death     | ALS       | Suicide   | Parkinson's | Alzheimer's |         |
|           |     | Level 1.5 | Level 1.5 | Level 1.5 | Level 1.5   | Level 1.5   |         |
| 2014      | 44  | 0.3350%   | 0.0115%   | 0.0433%   | 0.0028%     | 0.0057%     | 0.0003% |
| 2015      | 45  | 0.3630%   | 0.0118%   | 0.0475%   | 0.0028%     | 0.0057%     | 0.0003% |
| 2016      | 46  | 0.3920%   | 0.0129%   | 0.0521%   | 0.0028%     | 0.0051%     | 0.0004% |
| 2017      | 47  | 0.4180%   | 0.0120%   | 0.0571%   | 0.0028%     | 0.0058%     | 0.0004% |
| 2018      | 48  | 0.4380%   | 0.0129%   | 0.0626%   | 0.0028%     | 0.0087%     | 0.0005% |
| 2019      | 49  | 0.4570%   | 0.0130%   | 0.0687%   | 0.0028%     | 0.0125%     | 0.0005% |
| 2020      | 50  | 0.4780%   | 0.0122%   | 0.0753%   | 0.0028%     | 0.0181%     | 0.0006% |
| 2021      | 51  | 0.5040%   | 0.0132%   | 0.0825%   | 0.0028%     | 0.0258%     | 0.0007% |
| 2022      | 52  | 0.5380%   | 0.0127%   | 0.0905%   | 0.0028%     | 0.0362%     | 0.0008% |
| 2023      | 53  | 0.5800%   | 0.0133%   | 0.0992%   | 0.0028%     | 0.0500%     | 0.0009% |
| 2024      | 54  | 0.6320%   | 0.0125%   | 0.1088%   | 0.0028%     | 0.0680%     | 0.0010% |
| 2025      | 55  | 0.6910%   | 0.0122%   | 0.1193%   | 0.0028%     | 0.0840%     | 0.0011% |
| 2026      | 56  | 0.7570%   | 0.0133%   | 0.1308%   | 0.0028%     | 0.0978%     | 0.0013% |
| 2027      | 57  | 0.8280%   | 0.0123%   | 0.1435%   | 0.0028%     | 0.1079%     | 0.0015% |
| 2028      | 58  | 0.9060%   | 0.0123%   | 0.1573%   | 0.0028%     | 0.1137%     | 0.0017% |
| 2029      | 59  | 0.9910%   | 0.0122%   | 0.1725%   | 0.0028%     | 0.1143%     | 0.0020% |
| 2030      | 60  | 1.0860%   | 0.0113%   | 0.1891%   | 0.0028%     | 0.1233%     | 0.0023% |
| 2031      | 61  | 1.1920%   | 0.0104%   | 0.1982%   | 0.0028%     | 0.1341%     | 0.0025% |
| 2032      | 62  | 1.3110%   | 0.0095%   | 0.2082%   | 0.0028%     | 0.1577%     | 0.0028% |
| 2033      | 63  | 1.4440%   | 0.0102%   | 0.2192%   | 0.0028%     | 0.1989%     | 0.0030% |
| 2034      | 64  | 1.5900%   | 0.0102%   | 0.2312%   | 0.0028%     | 0.2643%     | 0.0033% |
| 2035      | 65  | 1.7530%   | 0.0095%   | 0.2444%   | 0.0028%     | 0.3320%     | 0.0036% |
| 2036      | 66  | 1.9320%   | 0.0097%   | 0.2589%   | 0.0028%     | 0.4022%     | 0.0039% |
| 2037      | 67  | 2.1220%   | 0.0087%   | 0.2747%   | 0.0028%     | 0.4674%     | 0.0042% |
| 2038      | 68  | 2.3230%   | 0.0102%   | 0.2921%   | 0.0028%     | 0.5224%     | 0.0046% |
| 2039      | 69  | 2.5380%   | 0.0097%   | 0.3112%   | 0.0028%     | 0.5629%     | 0.0049% |
| 2040      | 70  | 2.7850%   | 0.0098%   | 0.3321%   | 0.0028%     | 0.6032%     | 0.0053% |
| 2041      | 71  | 3.0590%   | 0.0101%   | 0.3739%   | 0.0028%     | 0.6409%     | 0.0058% |
| 2042      | 72  | 3.3430%   | 0.0105%   | 0.4232%   | 0.0028%     | 0.7023%     | 0.0063% |
| 2043      | 73  | 3.6330%   | 0.0107%   | 0.4811%   | 0.0028%     | 0.7932%     | 0.0069% |
| 2044      | 74  | 3.9420%   | 0.0117%   | 0.5493%   | 0.0028%     | 0.9205%     | 0.0075% |
| 2045      | 75  | 4.2990%   | 0.0123%   | 0.6295%   | 0.0028%     | 1.0630%     | 0.0082% |

## Hypothetical Player Case Profile #10

|                            |               |
|----------------------------|---------------|
| Disease Diagnosed          | Level 1.5 & 2 |
| Age at Diagnosis           | 72, 75        |
| Years played               | 6             |
| Year of Compensation       | 2042, 2045    |
| Total Nominal Compensation | \$248,759     |

Life Cycle Modeling For Individual Former NFL Player

|      |     | Incidence        |         |         |             |                       | Outcome          |     |         |             | Adverse<br>Diagnosis<br>Level 1.5<br>(Y/N) | Nominal<br>Compensation | Comments                           |
|------|-----|------------------|---------|---------|-------------|-----------------------|------------------|-----|---------|-------------|--------------------------------------------|-------------------------|------------------------------------|
| Year | Age | Natural<br>Death | ALS     | Suicide | Parkinson's | Alzheimer's Level 1.5 | Natural<br>Death | ALS | Suicide | Parkinson's | Alzheimer's Level 1.5                      |                         |                                    |
| 2014 | 44  | 0.3350%          | 0.0115% | 0.0433% | 0.0028%     | 0.0057%               |                  |     |         |             |                                            |                         |                                    |
| 2015 | 45  | 0.3630%          | 0.0118% | 0.0475% | 0.0028%     | 0.0057%               |                  |     |         |             |                                            |                         |                                    |
| 2016 | 46  | 0.3920%          | 0.0129% | 0.0521% | 0.0028%     | 0.0051%               |                  |     |         |             |                                            |                         |                                    |
| 2017 | 47  | 0.4180%          | 0.0126% | 0.0571% | 0.0028%     | 0.0058%               |                  |     |         |             |                                            |                         |                                    |
| 2018 | 48  | 0.4380%          | 0.0129% | 0.0626% | 0.0028%     | 0.0087%               |                  |     |         |             |                                            |                         |                                    |
| 2019 | 49  | 0.4570%          | 0.0130% | 0.0667% | 0.0028%     | 0.0125%               |                  |     |         |             |                                            |                         |                                    |
| 2020 | 50  | 0.4780%          | 0.0122% | 0.0753% | 0.0028%     | 0.0181%               |                  |     |         |             |                                            |                         |                                    |
| 2021 | 51  | 0.5040%          | 0.0132% | 0.0825% | 0.0028%     | 0.0258%               |                  |     |         |             |                                            |                         |                                    |
| 2022 | 52  | 0.5380%          | 0.0127% | 0.0905% | 0.0028%     | 0.0362%               |                  |     |         |             |                                            |                         |                                    |
| 2023 | 53  | 0.5800%          | 0.0133% | 0.0992% | 0.0028%     | 0.0500%               |                  |     |         |             |                                            |                         |                                    |
| 2024 | 54  | 0.6320%          | 0.0125% | 0.1088% | 0.0028%     | 0.0680%               |                  |     |         |             |                                            |                         |                                    |
| 2025 | 55  | 0.6910%          | 0.0122% | 0.1193% | 0.0028%     | 0.0840%               |                  |     |         |             |                                            |                         |                                    |
| 2026 | 56  | 0.7570%          | 0.0133% | 0.1308% | 0.0028%     | 0.0978%               |                  |     |         |             |                                            |                         |                                    |
| 2027 | 57  | 0.8280%          | 0.0123% | 0.1435% | 0.0028%     | 0.1079%               |                  |     |         |             |                                            |                         |                                    |
| 2028 | 58  | 0.9060%          | 0.0123% | 0.1573% | 0.0028%     | 0.1137%               |                  |     |         |             |                                            |                         |                                    |
| 2029 | 59  | 0.9910%          | 0.0122% | 0.1725% | 0.0028%     | 0.1143%               |                  |     |         |             |                                            |                         |                                    |
| 2030 | 60  | 1.0860%          | 0.0113% | 0.1891% | 0.0028%     | 0.1233%               |                  |     |         |             |                                            |                         |                                    |
| 2031 | 61  | 1.1920%          | 0.0104% | 0.1982% | 0.0028%     | 0.1341%               |                  |     |         |             |                                            |                         |                                    |
| 2032 | 62  | 1.3110%          | 0.0095% | 0.2082% | 0.0028%     | 0.1577%               |                  |     |         |             |                                            |                         |                                    |
| 2033 | 63  | 1.4440%          | 0.0102% | 0.2192% | 0.0028%     | 0.1969%               |                  |     |         |             |                                            |                         |                                    |
| 2034 | 64  | 1.5900%          | 0.0102% | 0.2312% | 0.0028%     | 0.2643%               |                  |     |         |             |                                            |                         |                                    |
| 2035 | 65  | 1.7530%          | 0.0095% | 0.2444% | 0.0028%     | 0.3320%               |                  |     |         |             |                                            |                         |                                    |
| 2036 | 66  | 1.9320%          | 0.0097% | 0.2589% | 0.0028%     | 0.4022%               |                  |     |         |             |                                            |                         |                                    |
| 2037 | 67  | 2.1220%          | 0.0087% | 0.2747% | 0.0028%     | 0.4674%               |                  |     |         |             |                                            |                         |                                    |
| 2038 | 68  | 2.3230%          | 0.0102% | 0.2921% | 0.0028%     | 0.5224%               |                  |     |         |             |                                            |                         |                                    |
| 2039 | 69  | 2.5380%          | 0.0097% | 0.3112% | 0.0028%     | 0.5629%               |                  |     |         |             |                                            |                         |                                    |
| 2040 | 70  | 2.7850%          | 0.0095% | 0.3321% | 0.0028%     | 0.6032%               |                  |     |         |             |                                            |                         |                                    |
| 2041 | 71  | 3.0590%          | 0.0104% | 0.3739% | 0.0028%     | 0.6409%               |                  |     |         |             |                                            |                         |                                    |
| 2042 | 72  | 3.3430%          | 0.0105% | 0.4233% | 0.0028%     | 0.7023%               |                  |     |         |             | X                                          | \$186,464               | Player diagnosed with Level 1.5    |
| 2043 | 73  | 3.6330%          | 0.0107% | 0.4811% | 0.0028%     | 0.7932%               |                  |     |         |             |                                            |                         |                                    |
| 2044 | 74  | 3.9420%          | 0.0117% | 0.5493% | 0.0028%     | 0.9205%               |                  |     |         |             |                                            |                         |                                    |
| 2045 | 75  | 4.2990%          | 0.0123% | 0.6295% | 0.0028%     | 1.0630%               |                  |     |         |             | X                                          | \$62,296                | Player diagnosed with Level 2      |
| 2046 | 76  | 4.7150%          | 0.0126% | 0.7238% | 0.0028%     | 1.2215%               |                  |     |         |             |                                            |                         |                                    |
| 2047 | 77  | 5.1840%          | 0.0132% | 0.8347% | 0.0028%     | 1.3765%               |                  |     |         |             |                                            |                         |                                    |
| 2048 | 78  | 5.7110%          | 0.0110% | 0.9652% | 0.0028%     | 1.5332%               | X                |     |         |             |                                            |                         | Player deceased from natural cause |

|                            |             |
|----------------------------|-------------|
| Disease Diagnosed          | ALS         |
| Age at Diagnosis           | 65          |
| Years played               | 3           |
| Year of Compensation       | 2035        |
| Total Nominal Compensation | \$2,504,487 |

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Hypothetical Player Case Profile #12

|                            |             |
|----------------------------|-------------|
| Disease Diagnosed          | Alzheimer's |
| Age at Diagnosis           | 55          |
| Years played               | 2           |
| Year of Compensation       | 2025        |
| Total Nominal Compensation | \$674,705   |

Life Cycle Modeling For Individual Former NFL Player

| Incidence |     |               |         |         | Outcome     |             |           |                   | Nominal Compensation | Comments                           |
|-----------|-----|---------------|---------|---------|-------------|-------------|-----------|-------------------|----------------------|------------------------------------|
| Year      | Age | Natural Death | ALS     | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Adverse Diagnosis |                      |                                    |
| 2014      | 44  | 0.3350%       | 0.0115% | 0.0439% | 0.0028%     | 0.0057%     | 0.0003%   | N                 |                      |                                    |
| 2015      | 45  | 0.3630%       | 0.0118% | 0.0475% | 0.0028%     | 0.0057%     | 0.0003%   | N                 |                      |                                    |
| 2016      | 46  | 0.3920%       | 0.0129% | 0.0521% | 0.0028%     | 0.0051%     | 0.0004%   | N                 |                      |                                    |
| 2017      | 47  | 0.4180%       | 0.0120% | 0.0571% | 0.0028%     | 0.0058%     | 0.0004%   | N                 |                      |                                    |
| 2018      | 48  | 0.4380%       | 0.0129% | 0.0626% | 0.0028%     | 0.0087%     | 0.0005%   | N                 |                      |                                    |
| 2019      | 49  | 0.4570%       | 0.0130% | 0.0687% | 0.0028%     | 0.0125%     | 0.0005%   | N                 |                      |                                    |
| 2020      | 50  | 0.4780%       | 0.0122% | 0.0753% | 0.0028%     | 0.0181%     | 0.0006%   | N                 |                      |                                    |
| 2021      | 51  | 0.5040%       | 0.0132% | 0.0825% | 0.0028%     | 0.0258%     | 0.0007%   | N                 |                      |                                    |
| 2022      | 52  | 0.5380%       | 0.0127% | 0.0905% | 0.0028%     | 0.0362%     | 0.0008%   | N                 |                      |                                    |
| 2023      | 53  | 0.5800%       | 0.0133% | 0.0992% | 0.0028%     | 0.0500%     | 0.0009%   | N                 |                      |                                    |
| 2024      | 54  | 0.6200%       | 0.0125% | 0.1088% | 0.0028%     | 0.0680%     | 0.0010%   | N                 |                      |                                    |
| 2025      | 55  | 0.6910%       | 0.0122% | 0.1193% | 0.0028%     | 0.0840%     | 0.0011%   | Y                 | \$674,705            | Player diagnosed with Alzheimer's  |
| 2026      | 56  | 0.7570%       | 0.0133% | 0.1308% | 0.0028%     | 0.0978%     | 0.0013%   | N                 |                      |                                    |
| 2027      | 57  | 0.8280%       | 0.0123% | 0.1435% | 0.0028%     | 0.1079%     | 0.0015%   | N                 |                      |                                    |
| 2028      | 58  | 0.9060%       | 0.0123% | 0.1573% | 0.0028%     | 0.1137%     | 0.0017%   | N                 |                      |                                    |
| 2029      | 59  | 0.9910%       | 0.0122% | 0.1725% | 0.0028%     | 0.1149%     | 0.0020%   | Deceased          |                      | Player deceased from natural cause |

Privileged and Confidential

### Hypothetical Player Case Profile #13

|                            |             |
|----------------------------|-------------|
| Disease Diagnosed          | Parkinson's |
| Age at Diagnosis           | 50          |
| Years played               | 5+          |
| Year of Compensation       | 2020        |
| Total Nominal Compensation | \$2,444,288 |

### Life Cycle Modeling For Individual Former NFL Player

|                                     |     |               | Incidence |         |             |             | Outcome   |               |     |         |             |             |           |                         |
|-------------------------------------|-----|---------------|-----------|---------|-------------|-------------|-----------|---------------|-----|---------|-------------|-------------|-----------|-------------------------|
| Year                                | Age | Natural Death | ALS       | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Natural Death | ALS | Suicide | Parkinson's | Alzheimer's | Level 1.5 | Adverse Diagnosis (Y/N) |
| 2014                                | 44  | 0.3350%       | 0.0115%   | 0.0433% | 0.0028%     | 0.0057%     | 0.0003%   |               |     |         |             |             |           | N                       |
| 2015                                | 45  | 0.3630%       | 0.0118%   | 0.0475% | 0.0028%     | 0.0057%     | 0.0003%   |               |     |         |             |             |           | N                       |
| 2016                                | 46  | 0.3920%       | 0.0129%   | 0.0521% | 0.0028%     | 0.0051%     | 0.0004%   |               |     |         |             |             |           | N                       |
| 2017                                | 47  | 0.4180%       | 0.0120%   | 0.0571% | 0.0028%     | 0.0058%     | 0.0004%   |               |     |         |             |             |           | N                       |
| 2018                                | 48  | 0.4380%       | 0.0129%   | 0.0626% | 0.0028%     | 0.0087%     | 0.0005%   |               |     |         |             |             |           | N                       |
| 2019                                | 49  | 0.4570%       | 0.0130%   | 0.0687% | 0.0028%     | 0.0125%     | 0.0005%   |               |     |         |             |             |           | N                       |
| 2020                                | 50  | 0.4780%       | 0.0122%   | 0.0753% | 0.0028%     | 0.0181%     | 0.0006%   |               |     |         | X           |             |           | Y                       |
| 2021                                | 51  | 0.5040%       | 0.0132%   | 0.0825% | 0.0028%     | 0.0258%     | 0.0007%   |               |     |         |             |             |           | N                       |
| 2022                                | 52  | 0.5380%       | 0.0127%   | 0.0905% | 0.0028%     | 0.0362%     | 0.0008%   |               |     |         |             |             |           | N                       |
| 2023                                | 53  | 0.5800%       | 0.0133%   | 0.0992% | 0.0028%     | 0.0500%     | 0.0009%   |               |     |         |             |             |           | N                       |
| 2024                                | 54  | 0.6320%       | 0.0125%   | 0.1088% | 0.0028%     | 0.0680%     | 0.0010%   |               |     |         |             |             |           | N                       |
| 2025                                | 55  | 0.6910%       | 0.0122%   | 0.1193% | 0.0028%     | 0.0840%     | 0.0011%   |               |     |         |             |             |           | N                       |
| 2026                                | 56  | 0.7570%       | 0.0133%   | 0.1308% | 0.0028%     | 0.0978%     | 0.0013%   |               |     |         |             |             |           | N                       |
| 2027                                | 57  | 0.8280%       | 0.0123%   | 0.1435% | 0.0028%     | 0.1079%     | 0.0015%   |               |     |         |             |             |           | N                       |
| 2028                                | 58  | 0.9060%       | 0.0123%   | 0.1573% | 0.0028%     | 0.1137%     | 0.0017%   |               |     |         |             |             |           | N                       |
| 2029                                | 59  | 0.9910%       | 0.0122%   | 0.1725% | 0.0028%     | 0.1143%     | 0.0020%   |               |     |         |             |             |           | N                       |
| 2030                                | 60  | 1.0860%       | 0.0113%   | 0.1891% | 0.0028%     | 0.1233%     | 0.0023%   |               |     |         |             |             |           | N                       |
| 2031                                | 61  | 1.1920%       | 0.0104%   | 0.1982% | 0.0028%     | 0.1341%     | 0.0025%   |               |     |         |             |             |           | N                       |
| 2032                                | 62  | 1.3110%       | 0.0095%   | 0.2082% | 0.0028%     | 0.1577%     | 0.0028%   |               |     |         |             |             |           | N                       |
| 2033                                | 63  | 1.4440%       | 0.0102%   | 0.2192% | 0.0028%     | 0.1989%     | 0.0030%   |               |     |         |             |             |           | N                       |
| 2034                                | 64  | 1.5900%       | 0.0102%   | 0.2312% | 0.0028%     | 0.2643%     | 0.0033%   |               |     |         |             |             |           | N                       |
| 2035                                | 65  | 1.7530%       | 0.0095%   | 0.2444% | 0.0028%     | 0.3320%     | 0.0036%   |               |     |         |             |             |           | N                       |
| 2036                                | 66  | 1.9320%       | 0.0097%   | 0.2589% | 0.0028%     | 0.4022%     | 0.0039%   |               |     |         |             |             |           | N                       |
| 2037                                | 67  | 2.1220%       | 0.0087%   | 0.2747% | 0.0028%     | 0.4674%     | 0.0042%   |               |     |         |             |             |           | N                       |
| 2038                                | 68  | 2.3230%       | 0.0102%   | 0.2921% | 0.0028%     | 0.5224%     | 0.0046%   | X             |     |         |             |             |           | Deceased                |
| Player deceased from natural causes |     |               |           |         |             |             |           |               |     |         |             |             |           |                         |

JA7709



## Hypothetical Player Case Profile #14

|                            |             |
|----------------------------|-------------|
| Disease Diagnosed          | Parkinson's |
| Age at Diagnosis           | 68          |
| Years played               | 4           |
| Year of Compensation       | 2038        |
| Total Nominal Compensation | \$922,546   |

# Life Cycle Modeling For Individual Former NFL Player

| Natural |     |         | Incidence |         |             |             |           |
|---------|-----|---------|-----------|---------|-------------|-------------|-----------|
| Year    | Age | Death   | ALS       | Suicide | Parkinson's | Alzheimer's | Level 1.5 |
| 2014    | 44  | 0.3350% | 0.0115%   | 0.0433% | 0.0028%     | 0.0057%     | 0.0003%   |
| 2015    | 45  | 0.3630% | 0.0118%   | 0.0475% | 0.0028%     | 0.0057%     | 0.0003%   |
| 2016    | 46  | 0.3920% | 0.0129%   | 0.0521% | 0.0028%     | 0.0051%     | 0.0004%   |
| 2017    | 47  | 0.4180% | 0.0120%   | 0.0571% | 0.0028%     | 0.0058%     | 0.0004%   |
| 2018    | 48  | 0.4380% | 0.0129%   | 0.0626% | 0.0028%     | 0.0087%     | 0.0005%   |
| 2019    | 49  | 0.4570% | 0.0130%   | 0.0687% | 0.0028%     | 0.0125%     | 0.0005%   |
| 2020    | 50  | 0.4780% | 0.0122%   | 0.0733% | 0.0028%     | 0.0181%     | 0.0006%   |
| 2021    | 51  | 0.5040% | 0.0132%   | 0.0825% | 0.0028%     | 0.0258%     | 0.0007%   |
| 2022    | 52  | 0.5380% | 0.0127%   | 0.0905% | 0.0028%     | 0.0362%     | 0.0008%   |
| 2023    | 53  | 0.5800% | 0.0133%   | 0.0992% | 0.0028%     | 0.0500%     | 0.0009%   |
| 2024    | 54  | 0.6320% | 0.0125%   | 0.1088% | 0.0028%     | 0.0680%     | 0.0010%   |
| 2025    | 55  | 0.6910% | 0.0122%   | 0.1193% | 0.0028%     | 0.0840%     | 0.0011%   |
| 2026    | 56  | 0.7570% | 0.0133%   | 0.1308% | 0.0028%     | 0.0978%     | 0.0013%   |
| 2027    | 57  | 0.8280% | 0.0123%   | 0.1435% | 0.0028%     | 0.1079%     | 0.0015%   |
| 2028    | 58  | 0.9060% | 0.0123%   | 0.1573% | 0.0028%     | 0.1137%     | 0.0017%   |
| 2029    | 59  | 0.9910% | 0.0122%   | 0.1725% | 0.0028%     | 0.1143%     | 0.0020%   |
| 2030    | 60  | 1.0860% | 0.0113%   | 0.1891% | 0.0028%     | 0.1233%     | 0.0023%   |
| 2031    | 61  | 1.1920% | 0.0104%   | 0.1982% | 0.0028%     | 0.1341%     | 0.0025%   |
| 2032    | 62  | 1.3110% | 0.0095%   | 0.2082% | 0.0028%     | 0.1577%     | 0.0028%   |
| 2033    | 63  | 1.4440% | 0.0102%   | 0.2192% | 0.0028%     | 0.1989%     | 0.0030%   |
| 2034    | 64  | 1.5900% | 0.0102%   | 0.2312% | 0.0028%     | 0.2643%     | 0.0033%   |
| 2035    | 65  | 1.7530% | 0.0095%   | 0.2444% | 0.0028%     | 0.3320%     | 0.0036%   |
| 2036    | 66  | 1.9320% | 0.0097%   | 0.2589% | 0.0028%     | 0.4022%     | 0.0039%   |
| 2037    | 67  | 2.1220% | 0.0087%   | 0.2747% | 0.0028%     | 0.4674%     | 0.0042%   |
| 2038    | 68  | 2.3230% | 0.0102%   | 0.2921% | 0.0028%     | 0.5224%     | 0.0046%   |
| 2039    | 69  | 2.5380% | 0.0097%   | 0.3112% | 0.0028%     | 0.5629%     | 0.0049%   |
| 2040    | 70  | 2.7850% | 0.0098%   | 0.3321% | 0.0028%     | 0.6032%     | 0.0053%   |
| 2041    | 71  | 3.0590% | 0.0101%   | 0.3739% | 0.0028%     | 0.6409%     | 0.0058%   |
| 2042    | 72  | 3.3430% | 0.0105%   | 0.4232% | 0.0028%     | 0.7023%     | 0.0063%   |
| 2043    | 73  | 3.6330% | 0.0107%   | 0.4811% | 0.0028%     | 0.7532%     | 0.0069%   |

[illegible]

| Nominal Compensation | Comments                            |
|----------------------|-------------------------------------|
|                      |                                     |
|                      |                                     |
|                      |                                     |
|                      |                                     |
|                      |                                     |
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|                      |                                     |
|                      |                                     |
|                      |                                     |
|                      |                                     |
|                      |                                     |
|                      |                                     |
|                      |                                     |
| \$922,546            | Player diagnosed with Parkinson's   |
|                      |                                     |
|                      |                                     |
|                      | Player deceased from natural causes |

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**Appendix E: List of Deceased Former NFL Players with CTE**

List of Deceased Former NFL Players, Death with CTE (2000 - 2013)

| <u>Player Case No.</u> | <u>Year of Death</u> | <u>Seasons</u> | <u>Age at Death</u> | <u>Co-morbidity</u>  | <u>Filed Plaintiff</u> |
|------------------------|----------------------|----------------|---------------------|----------------------|------------------------|
| 1                      | 2002                 | 17             | 50                  |                      | No                     |
| 2                      | 2004                 | 9              | 36                  |                      | No                     |
| 3                      | 2005                 | 8              | 45                  |                      | No                     |
| 4                      | 2006                 | 12             | 44                  |                      | Yes                    |
| 5                      | 2008                 | 10             | 45                  |                      | Yes                    |
| 6                      | 2008                 | 16             | 66                  | ALS (cause of death) | Yes                    |
| 7                      | 2008                 | 9              | 45                  |                      | Yes                    |
| 8                      | 2009                 | 10             | 82                  |                      | No                     |
| 9                      | 2009                 | 11             | 38                  |                      | Yes                    |
| 10                     | 2009                 | 5              | 26                  |                      | No                     |
| 11                     | 2009                 | 2              | 64                  |                      | Yes                    |
| 12                     | 2009                 | 1              | 75                  | AD                   | Yes                    |
| 13                     | 2009                 | 1              | 49                  | ALS                  | Yes                    |
| 14                     | 2010                 |                | 86                  |                      | No                     |
| 15                     | 2010                 | 10             | 78                  |                      | Yes                    |
| 16*                    | 2010                 | 3              | 36                  |                      | No                     |
| 17                     | 2010                 | 15             | 71                  |                      | No                     |
| 18                     | 2010                 | 7              | 98                  |                      | No                     |
| 19                     | 2010                 | 7              | 56                  |                      | Yes                    |
| 20                     | 2010                 | 1              | 47                  |                      | No                     |
| 21                     | 2010                 | 1              | 23                  |                      | No                     |
| 22*                    | 2010                 | 1              | 87                  |                      | No                     |
| 23                     | 2011                 | 5              | 73                  |                      | No                     |
| 24                     | 2011                 | 11             | 65                  |                      | Yes                    |
| 25                     | 2011                 | 6              | 69                  |                      | Yes                    |
| 26                     | 2011                 | 11             | 50                  |                      | Yes                    |
| 27                     | 2011                 | 8              | 67                  | ALS (2000)           | Yes                    |
| 28                     | 2011                 | 6              | 75                  |                      | No                     |
| 29                     | 2011                 | 13             | 81                  |                      | No                     |
| 30                     | 2011                 | 6              | 77                  |                      | Yes                    |
| 31                     | 2011                 | 2              | 56                  |                      | Yes                    |
| 32*                    | 2011                 |                | 74                  |                      | No                     |
| 33                     | 2011                 | 10             | 69                  | Dementia             | Yes                    |
| 34                     | 2011                 | 15             | 80                  | Dementia             | Yes                    |
| 35                     | 2011                 | 16             | 84                  | Dementia             | No                     |
| 36                     | 2012                 | 0.5            | 52                  | ALS (2002)           | No                     |
| 37*                    | 2012                 |                |                     |                      | No                     |
| 38                     | 2012                 | 8              | 62                  |                      | Yes                    |
| 39                     | 2012                 | 8              | 52                  |                      | No                     |
| 40                     | 2012                 | 2              | 56                  |                      | Yes                    |
| 41                     | 2012                 | 1              | 25                  |                      | No                     |
| 42                     | 2012                 | 21             | 43                  |                      | Yes                    |
| 43                     | 2012                 | 8              | 69                  | Dementia             | Yes                    |
| 44                     | 2012                 | 9              | 78                  |                      | No                     |
| 45                     | 2012                 | 8              | 61                  | Dementia             | Yes                    |
| 46                     | 2013                 | 1              | 30                  |                      | No                     |
| 47                     | 2013                 | 6              | 70                  |                      | No                     |
| 48                     | 2013                 | 9              | 75                  |                      | Yes                    |
| 49                     | 2012                 | 10             | 68                  |                      | Yes                    |
| 50                     | 2008                 | 7              | 52                  |                      | No                     |

\*Player data could not be matched to player database and no secondary confirmation of NFL affiliation could be found and therefore was not included in the analysis.

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**Appendix F: CV of Thomas Vasquez Ph.D.**

Dr. Vasquez is a vice president at Analysis, Research, Planning Corporation (ARPC) in the New York office. Dr. Vasquez has over 35 years of experience in management consulting for private sector clients, the development of economic models for US and foreign governments to analyze and develop tax, expenditure and regulatory policy and providing expert testimony over a wide range of issues.

Dr. Vasquez has provided management consulting services for private sector companies in a wide array of industry sectors. The services include identifying methods to: (1) increase the stock price or value of the company; (2) leverage the firm's brand asset; (3) assist underperforming companies and (4) provide general valuation services.

Dr. Vasquez has assisted US and foreign governments in the development of tax, expenditure and regulatory policy. The services include the development of large scale micro-economic models to allow policymakers to determine individual and company behavioral reactions to tax and regulatory policy.

Dr. Vasquez has provided expert testimony, depositions and analytical litigation support on a broad spectrum of issues involving statistical techniques, computer simulation, economic behavior and economic models, including, among others:

- Using statistical models to forecast a company's future liability from lawsuits related to its former production of asbestos including the following representative assignments – National Gypsum Corporation, the Fibreboard Corporation, Owens Corning, Congoleum, Western MacArthur, Burns and Roe, Inc. and Specialty Products Holding Corp.,
- Using statistical models to forecast a company's future liability from lawsuits related to its former sales of insurance products.
- The statistical analysis of the determinants of supply and demand in certain industry segments for use in business valuations before the Bankruptcy Court.
- The impact of regulation and tax policy on prices, sales and production.
- Analyzing the allocation of liability from a state's superfund tax.
- The statistical analysis of reasonable officer compensation levels in closely held companies.

Prior to joining ARPC, Dr. Vasquez was president and CEO of Yankelovich Partners, Inc., a leading market research firm. While at Yankelovich Partners, Dr. Vasquez had responsibility for engagements designed to determine the best approach to maximize the value of the client's firm. These engagements involved understanding the source of the value components of the firm – value of the firm's brand, product/service lines responsible for increasing (decreasing) stock price, the role of joint products and other key components of the firm's value.

From 1993 to 1997, Dr. Vasquez was the National Partner in Charge of Corporate Transactions Services for KPMG Peat Marwick. In this role he practiced in and led four of KPMG's national practices. One practice area was in the area of litigation support. This area involved almost exclusively the use of highly trained professionals in providing expert testimony in a wide range

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of litigation issues. The second practice area involved providing consulting services in the bankruptcy and troubled company area. This area involved analyzing the condition and prospects of a company in financial distress, generally involving recommendations for expense control, revenue growth, elimination/sale of product and distribution lines and the elimination/selling of production sites. The third area is investment banking. This area focused on three major components: (1) buying and/or selling of companies for middle market clients; (2) advise to non-public clients preparing an Initial Public Offering, and (3) advise to clients on methods to increase share price and/or cash flow in anticipation of sale. The fourth area was business valuation. This area focused on the valuation of businesses in a wide range of settings including bankruptcy, fairness opinions, mergers and acquisitions, estate planning and other venues requiring valuation services.

Dr. Vasquez served on the Firm's Board of Directors from 1993 to 1997 and served as the Chairman of the Board's Strategic Planning Committee.

Prior to selling his firm to KPMG, Dr. Vasquez was the founder and President of the Policy Economics Group. Dr. Vasquez was responsible for all data base development and tax simulation modeling for federal and state government clients in the United States as well as foreign governments including among others Egypt, Pakistan, Hungary, the former Soviet Union, Trinidad-Tobago, Virgin Islands, Guam, El Salvador and Guatemala. Dr. Vasquez also developed similar models using specialized industry data bases to determine tax impacts and behavioral responses for commercial firms, industry associations and law firms. These models were also used to formulate the client's strategic direction, market initiatives and value maximization strategies.

Prior to establishing the Policy Economics Group, Dr. Vasquez was the Deputy Director for the U.S. Department of the Treasury Office of Tax Analysis. While there, he guided U.S. tax policy analysis and designed large micro-simulation models and data bases for the U.S. Treasury Department and the Joint Tax Committee of the U.S. Congress. He appeared before Congress to provide testimony on such issues as capital gains taxation. He also designed numerous specialized models and data bases for analyzing policy issues at the company, industry, and individual levels.

### **Professional Experience:**

President and CEO, Yankelovich Partners Inc., 1997 to 1999  
 National Partner in Charge, Corporate Transactions Services, KPMG Peat Marwick, 1993 to 1997.  
 Managing Partner, Policy Economics Group, KPMG Peat Marwick, 1987 to 1993.  
 Founder and President, Policy Economics Group, 1983 to 1987.  
 Deputy Director, Office of Tax Analysis, U.S. Department of the Treasury, 1979 to 1983.  
 Assistant Director, 1978 to 1979; Fiscal Economist, 1972 to 1976.  
 Chief Economist, New York State Economic Development Board, 1977 to 1978.  
 Staff Economist, Congressional Joint Committee on Taxation, 1976.  
 Staff Economist, American Enterprise Institute for Public Policy Research, 1972.

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**Education:**

Ph.D., Economics, Clark University, 1973.  
M.A., Economics, Clark University, 1972.  
B.S., Mathematics, State University of New York - Potsdam, 1970.

**Legal Experience and Testimony:**

National Gypsum Company Bankruptcy Proceedings, 1991  
Deposition  
Testimony  
Gerald Ahern, et. al. vs. Fiberboard Corporation, et. al., 1994  
Deposition  
Testimony  
Ezell Thomas, et. al. vs. R.J. Reynolds Tobacco Company, et. al., 1999  
Deposition  
Fiberboard Corporation and Owens Corning vs. R.J.Reynolds Tobacco Company, et. al., 1999  
Deposition  
Western Mac Arthur Company and Mac Arthur Company vs. General Accident Insurance Co. of America; United States Fidelity & Guaranty Co.; Argonaut Insurance Company, 1999  
Affidavit  
CSX Transportation, Inc. and American Home Ins. Co., 2000  
Deposition  
ADR Proceeding Celotex vs. Travelers Casualty and Surety Co. and London Market Insurers, 2000  
Deposition, 2004  
Testimony, 2004  
Owens Corning Bankruptcy Proceedings, 2001  
Deposition, 2004  
Trial Testimony, 2005  
Michael Albanese vs. Compaq Computer Corporation, 2002  
Affidavit  
ADR Proceeding ACandS, Inc. vs. Travelers Casualty and Surety Co., 2003  
ASARCO vs  
Deposition, 2003  
Western Mac Arthur Company and Mac Arthur Company Bankruptcy Proceedings, 2003  
Oglebay Norton Bankruptcy Proceedings, 2004  
Deposition, 2004  
Trial Testimony, 2004  
Halliburton Bankruptcy Proceedings, 2004  
Congoleum vs Ace Ins. Et al, 2005  
Deposition, 2005  
Trial Testimony, 2006  
Gene B. Griego, et al., Plaintiffs, vs. Bechtel National, Inc. et al., Defendants  
Deposition, 2005  
Sandra Sue Fullen, et al, Plaintiffs v. Philips Electronics North America Corporation, a Delaware corporation, et al., Defendants  
Deposition, 2005

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St. Paul Fire and Marine Insurance Company, Plaintiff, vs. A.P.I., Inc., Defendant and Counter-Claimant

Deposition, 2005

Dana Corporation Bankruptcy Proceedings, Case No. 06-10354(BLR), 2007

Deposition, 2007

Trial Testimony, 2007

API, INC. Asbestos Settlement Trust v. Atlantic Mutual Insurance Company; Civil No. 09-0665 (JRT/JJG); United States District Court, D. Minnesota; July 9, 2010.

Deposition, 2010

Applebee's International, Inc., DineEquity, Inc. and Weight Watchers International, Inc. Sheree Shepard and Anthony Watts, On Behalf of Themselves and All Others Similarly Situated vs. DineEquity, Inc. et al.; United States District Court; District of Kansas; No. 08-cv-2416.

Deposition, 2010

API, Inc. Asbestos Settlement trust, et al. v. Zurich American Insurance Company, et al. Court File No. 09-CV-975 (JRT/JJG)

Deposition, March 29, 2011

Tronox Incorporated, Tronox Worldwide, LLC f/k/a; Kerr-McGee Chemical Worldwide LLC, and Tronox, LLC, f/k/a Kerr-McGee Chemical LLC vs. Anadarko Petroleum Corporation and Kerr-McGee Corporation

Deposition 2012

Specialty Products Holding Corp., et al Bankruptcy proceedings, Case No. 10-11780(JFK), 2012

Deposition, 2012

Trial Testimony, 2013

# Exhibit 2

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

|                                                                                                                                                                                                                                                                      |                                                              |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|
| IN RE: NATIONAL FOOTBALL LEAGUE<br>PLAYERS' CONCUSSION INJURY<br>LITIGATION                                                                                                                                                                                          | No. 2:12-md-02323-AB<br>MDL No. 2323                         |
| Kevin Turner and Shawn Wooden,<br><i>on behalf of themselves and<br/>others similarly situated,</i><br><br>Plaintiffs,<br><br>v.<br><br>National Football League and<br>NFL Properties, LLC,<br>successor-in-interest to<br>NFL Properties, Inc.,<br><br>Defendants. | Hon. Anita B. Brody<br><br>Civil Action No. 2:14-cv-00029-AB |
| THIS DOCUMENT RELATES TO:<br>ALL ACTIONS                                                                                                                                                                                                                             |                                                              |

**DECLARATION OF THOMAS VASQUEZ Ph.D.**

1. I have personal knowledge concerning the matters addressed herein, and submit this declaration in connection with Plaintiffs' motion for approval of the proposed settlement of claims in this litigation. If called as a witness, I could and would testify competently to the facts and opinions set forth in this declaration. I hold all of the opinion set forth herein to a reasonable degree of scientific certainty.

2. I am Vice President of Analysis Research Planning Corporation ("ARPC"), headquartered in Washington, D.C. I have over 35 years of experience in management consulting for private sector clients, and the development of economic models for US and foreign governments to analyze and develop tax, expenditure and regulatory policy. I have



provided expert testimony and analytical support for a broad spectrum of issues and industries. I have consulted on numerous cases including cases for National Gypsum, Fireboard Corporation, Reynolds Tobacco, CSX Inc., Owens Corning, Tyson Foods, Halliburton, AstraZeneca, Foster Wheeler, Gulf Coast Claims Facility, GM Ignition Switch Compensation Fund, and Oracle.

3. Before joining ARPC, I was CEO of Yankelovich Partners, and the Partner in charge of KPMG's Corporate Transactions practice, which includes the bankruptcy practice, the valuation practice, the investment banking and litigation support practice and the expert testimony practice. I was the founder and President of the Policy Economics Group, a firm that was subsequently sold to KPMG. I was responsible for all data base development and tax simulation modeling for federal and state government clients in the United States as well as foreign governments including, among others, Egypt, Pakistan, Hungary, the former Soviet Union, Trinidad-Tobago, Virgin Islands, Guam, El Salvador, and Guatemala. Earlier in my career, I was the Deputy Director of the Office of Tax Analysis at the U.S. Department of Treasury, where I designed and built economic models used to analyze U.S. Government policies. A copy of my CV is attached to this declaration as Exhibit A.

4. In mid-2013, I was asked by Co-Lead Class Counsel in the federal multidistrict litigation<sup>1</sup> to undertake an analysis to assist in settlement negotiations. The analysis was designed to assist in developing a monetary award grid that could be used in negotiating claims and modeling the total cost of resolving all pending and future claims by former National Football League (NFL) players alleging brain injury caused by concussive and sub-concussive impacts (concussion-related injuries). I was also asked to determine whether the agreed upon settlement amount and timing of payments was sufficient to meet all the obligations arising from

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<sup>1</sup> *In re: National Football League Players' Concussion Injury Litigation*, (MDL No. 2323) (E.D. Pa.).

these claims. My conclusions concerning the sufficiency of the Monetary Award Fund of \$675 million were included in my February 2014 report.<sup>2</sup>

5. As a result of issues raised by certain objecting parties, I have now been asked to elaborate on certain elements of the work I conducted for my initial report. Specifically, I have been asked to discuss: (1) the procedures applied in the development of the Monetary Award Grid, including the effect of age and years played on award amounts, and (2) the sufficiency of funding for the Baseline Assessment Program (BAP).

### **Development of the Monetary Award Matrix**

6. The development of settlement award matrices is generally affected by three components: (i) incorporating the effect of additional factors (not related to concussion in the NFL) that likely contribute to the impairment of the individual; (ii) incorporating the general influence of the known characteristics of the U.S. tort system, and (iii) negotiation between plaintiffs and defendants.

7. The following addresses the issues involving the first two components. The diseases compensated in the program are not solely found in former football players. Indeed, they are experienced by all types of individuals. The incidence of these diseases is found across gender, all races, all occupations, and likely within any cohort one may define.

8. This fact clearly demonstrates that there is not a sole, direct causal link between playing football, experiencing concussions, and contracting some level of neurological impairment or condition/disease. Indeed, we should expect that if there were no causal link between concussions and these diseases, many of the former players would nonetheless contract one of

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<sup>2</sup> See “NFL Concussion Liability Forecast”, February 14, 2014 (attached to this declaration as Exhibit B).

these diseases in their lifetime (in this hypothetical the incidence rate would be that of the general population).

9. Of course, the exact contribution of all the factors (concussions and the other factors) cannot be known. Epidemiologists may attempt to statistically determine the relative contribution of one or a few of the factors by viewing large groups of individuals. The analysis may indicate the average relative effect of various factors on the entire group, but cannot conclude anything about a single individual.

10. Two factors are of particular concern in the development of the award matrix. The first is that the compensable disease types are strongly related to age (less so with ALS); as an individual ages, his probability of contracting one of the compensable diseases increases dramatically regardless of whether or not he played football. The second is the number and severity of concussions that a player experienced (due to the reported connection between TBI and the onset of neurological impairment/disease).

11. The relative values highlight the effect of age. As former players age, the relative contribution of concussions experienced as a player declines in importance – an unfortunate consequence of aging is the higher probability of the onset of serious neurological impairment issues. The Monetary Award Matrix recognizes the reduced contribution of concussions and lowers the award amount as the player ages.

12. Table 1 shows the relative impact of age on the onset of Level II (Dementia). In the general population, it is estimated that a 75 year old is 302 times more likely to experience dementia than a 45 year old. All else equal, dementia experienced by a 75 year old is less likely to have been caused by concussions. A major factor is simply the process of aging.

**Table 1****Relative Values: Annual Incidence of Disease, by Age**

| <u>Age</u> | <u>Level II<br/>(Dementia)</u> |
|------------|--------------------------------|
| 45         | 1                              |
| 55         | 13                             |
| 65         | 82                             |
| 75         | 302                            |

Note: Individual years are interpolations from broad age groups  
 Level II is based on the incidence rates for dementia

13. It is reported in the scientific literature that the frequency and severity of TBI are factors in the causal link between TBI and the onset of neurological impairment/disease - the higher the number and severity of TBI, the greater the risk of neurological impairment. However, accurate and complete information on the number and severity of the concussions experienced by former players is lacking. Therefore, the number of years played by a former player is used as a proxy for the exposure to concussions and TBI. It is assumed that the longer an individual played, the greater the number and severity of impacts he experienced and the greater should be his monetary award. Years played in the NFL also recognizes the significance of pre-NFL concussion risk (*e.g.*, youth football, high school football, college football) which may have contributed greater relative exposure in players playing few years in the NFL.

14. The Monetary Award Matrix incorporates this effect into its values. A player with at least five years of playing time receives full award values for any disease. For players with less than five years of playing time the award values are reduced proportionately as playing time decreases.



### **Incorporating the Effect of the U.S. Tort System**

15. It has long been recognized that the age of a claimant affects the value of his claim in the tort system; all else equal, the older the individual, the lower the award. While a precise quantification of this effect is not possible, a few of the reasons generally accepted as the cause of the age effect include: (1) lower lost earnings (since the older individual has a shorter remaining work life), (2) lower costs for long term medical care (since the older individual has a shorter life expectancy), and (3) fewer dependents.

16. Experience indicates because of these factors, the award may be reduced by 2% to 3% for every year over age 45. This effect is also incorporated in the matrix. These considerations were incorporated into a working model of the matrix to be used in connection with negotiating the settlement.

### **Sufficiency of Funding for the Baseline Assessment Program (BAP)**

17. In connection with my original work on the Settlement, I analyzed the sufficiency of funding for the BAP.<sup>3</sup> The following summarizes my analysis and conclusions concerning the BAP funding. The BAP provides for:

- testing of former NFL players to establish baseline levels of neurocognitive functioning and,
- paying supplemental financial benefits (BAP supplemental benefits) for players who are diagnosed under the BAP with Level 1 neurocognitive impairment.

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<sup>3</sup> The Class Action Settlement Agreement as of June 25, 2014 ensures that the \$75 million funding for the BAP is sufficient. Section 5.14 (b) states: “the maximum per player BAP Supplemental Benefit payable under this Section, taking into account such factors as the number of Retired NFL Football Players using the BAP and diagnosed with Level 1 Neurocognitive Impairment, shall be determined on the one-year anniversary of the commencement of the BAP by Co-Lead Class Counsel and Counsel for the NFL Parties, in consultation with the BAP Administrator, and with the approval of the Court. The maximum per player benefit will be set at a sufficient level to ensure that there will be sufficient funds, without exceeding the Seventy-Five Million United States Dollars (U.S. \$75,000,000) cap on the BAP Fund, to pay for every Retired NFL Football Player to receive one baseline assessment examination.”

18. The settlement agreement provides \$75 million for the BAP fund to cover both the baseline testing and supplemental benefits. Testing under the BAP will proceed for 10 years after its implementation; Supplemental Benefits may be payable for an additional 5 years after expiration of the testing period.

19. There are three main components that determine the total cost of the BAP program. The first is the cost of the BAP program for Baseline Examinations, which is dependent on the number of players who will participate in the baseline examination program, and the average cost per examination.

20. The second is the cost of Supplemental Benefits provided to retired players under the BAP program, which is dependent on the number of players that will qualify for supplemental benefits, and the average supplemental benefit.

21. The third is the cost to administer the BAP program.

22. The remainder of this document describes my conclusions regarding the total cost of the Program, as well as a description of the methodology used to form my conclusions. Certain components of the analysis are dependent on cost estimates provided by the BAP Administrator.<sup>4</sup>

### **Costs of Baseline Examinations**

23. The key issue in determining the adequacy of the fund is the estimate of the number of players who will participate in the BAP program for baseline examinations. Retired players that have registered for the Settlement are eligible to participate in the baseline examination component of the Program. The analysis conducted for my February 2014 Report reflected that as many as 11,886 former players who were still alive at the end of 2013 would register for the

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<sup>4</sup> Garretson Resolution Group.

Settlement. Of these, 96 have already received a Qualifying Diagnosis leaving 11,790 players who are assumed to participate in the BAP.<sup>5</sup>

24. The average cost of a baseline exam is estimated by the BAP Administrator to be \$3,500 per exam. This results in a total nominal cost of approximately \$41.3 million (\$3,500 times 11,790 participating players).

### **Funding Available for Supplemental Benefits**

25. The cost of supplemental benefits depends on the estimate of the number of players with Level 1 neurocognitive impairments and the average cost per eligible player. As indicated above, the Settlement Agreement ensures that funding is adequate by providing that supplemental benefits will be set to precisely exhaust the \$75 million of funding.

26. Table 2 shows the amount of funds available for Supplemental Benefits. Administrative costs and baseline examinations are anticipated to cost approximately \$48.8 million. That leaves \$26.2 million available to pay supplemental benefits.

---

<sup>5</sup> All living retired players yet to manifest a disease and be diagnosed who register are assumed to participate in the BAP. As indicated in my February 2014 Report, there are 11,790 players that are still alive, but as yet undiagnosed, including both those who have already filed lawsuits and additional players whom it is assumed will register for the Settlement in the future.

**Table 2****Estimated Cost of BAP Program - Baseline Examination,  
BAP Supplemental Benefits and Cost of Administration**

(\$ Millions)

| <u>Category</u>                            | <u>Amount</u> |
|--------------------------------------------|---------------|
| Total Fund Value                           | \$75.0        |
| Use of Funds                               |               |
| Administration Costs <sup>1</sup>          | \$7.5         |
| Cost of Baseline Examinations <sup>2</sup> | \$41.3        |
| Amount Available for Supplemental Benefits | <u>\$26.2</u> |
| Total Use of Funds                         | \$75.0        |

1.) Source of administrative costs: BAP Administrator

2.) 11,790 former players at an average cost of \$3,500 per exam

Source of \$3,500 average cost: BAP Administrator

27. Based on information provided by the 4,200 former players that have already filed claims, as well as background and induced incidence rates for Level 1 neurocognitive impairments, I estimate that between 500 and 750 former players will be diagnosed with Level 1 Neurocognitive Impairment and thus qualify for Supplemental Benefits.

28. Table 3 shows the average amount per player of Supplemental Benefits that could be paid under three alternative eligibility assumptions. The alternative assumptions allow for average per player Supplemental Benefits from a low of \$35,000 to a high of \$52,000.



**Table 3****Average Supplemental Benefits Under Alternative Eligibility Assumptions**

| <u>Alternative</u> | <u>Number of<br/>Players Receiving<br/>Supplemental Benefits</u> | <u>Average<br/>Benefit</u> | <u>Total<br/>Cost<br/>(\$ millions)</u> |
|--------------------|------------------------------------------------------------------|----------------------------|-----------------------------------------|
| Low                | 500                                                              | \$52,000                   | \$26.2                                  |
| Middle             | 625                                                              | \$42,000                   | \$26.2                                  |
| High               | 750                                                              | \$35,000                   | \$26.2                                  |

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: November 12, 2014

Washington, D.C.



Thomas Vasquez, Ph.D.

# Exhibit A

*CV of Thomas Vasquez Ph.D.*

Dr. Vasquez is a vice president at Analysis, Research & Planning Corporation (ARPC) in the New York office. Dr. Vasquez has over 35 years of experience in management consulting for private sector clients, the development of economic models for US and foreign governments to analyze and develop tax, expenditure and regulatory policy and providing expert testimony over a wide range of issues.

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- Using statistical models to forecast a company's future liability from lawsuits related to its former sales of products.
- Using statistical models to determine the settlement value of bodily injury and financial loss claims resulting from exposure to a wide range of hazardous or defective materials or activities.
- The statistical analysis of the determinants of supply and demand in certain industry segments for use in business valuations before the Bankruptcy Court.
- The impact of regulation and tax policy on prices, sales and production.
- Analyzing the allocation of liability from a state's superfund tax.
- The statistical analysis of reasonable officer compensation levels in closely held companies.

Prior to joining ARPC, Dr. Vasquez was president and CEO of Yankelovich Partners, Inc., a leading market research firm. While at Yankelovich Partners, Dr. Vasquez had responsibility for engagements designed to determine the best approach to maximize the value of the client's firm. These engagements involved understanding the source of the value components of the firm – value of the firm's brand, product/service lines responsible for increasing (decreasing) stock price, the role of joint products and other key components of the firm's value.

From 1993 to 1997, Dr. Vasquez was the National Partner in Charge of Corporate Transactions Services for KPMG Peat Marwick. In this role he practiced in and led four of KPMG's national

practices. One practice area was in the area of litigation support. This area involved almost exclusively the use of highly trained professionals in providing expert testimony in a wide range of litigation issues. The second practice area involved providing consulting services in the bankruptcy and troubled company area. This area involved analyzing the condition and prospects of a company in financial distress, generally involving recommendations for expense control, revenue growth, elimination/sale of product and distribution lines and the elimination/selling of production sites. The third area is investment banking. This area focused on three major components: (1) buying and/or selling of companies for middle market clients; (2) advise to non-public clients preparing an Initial Public Offering, and (3) advise to clients on methods to increase share price and/or cash flow in anticipation of sale. The fourth area was business valuation. This area focused on the valuation of businesses in a wide range of settings including bankruptcy, fairness opinions, mergers and acquisitions, estate planning and other venues requiring valuation services.

Dr. Vasquez served on the Firm's Board of Directors from 1993 to 1997 and served as the Chairman of the Board's Strategic Planning Committee.

Prior to selling his firm to KPMG, Dr. Vasquez was the founder and President of the Policy Economics Group. Dr. Vasquez was responsible for all data base development and tax simulation modeling for federal and state government clients in the United States as well as foreign governments including among others Egypt, Pakistan, Hungary, the former Soviet Union, Trinidad-Tobago, Virgin Islands, Guam, El Salvador and Guatemala. Dr. Vasquez also developed similar models using specialized industry data bases to determine tax impacts and behavioral responses for commercial firms, industry associations and law firms. These models were also used to formulate the client's strategic direction, market initiatives and value maximization strategies.

Prior to establishing the Policy Economics Group, Dr. Vasquez was the Deputy Director for the U.S. Department of the Treasury Office of Tax Analysis. While there, he guided U.S. tax policy analysis and designed large micro-simulation models and data bases for the U.S. Treasury Department and the Joint Tax Committee of the U.S. Congress. He appeared before Congress to provide testimony on such issues as capital gains taxation. He also designed numerous specialized models and data bases for analyzing policy issues at the company, industry, and individual levels.

### **Professional Experience:**

President and CEO, Yankelovich Partners Inc., 1997 to 1999  
 National Partner in Charge, Corporate Transactions Services, KPMG Peat Marwick, 1993 to 1997.  
 Managing Partner, Policy Economics Group, KPMG Peat Marwick, 1987 to 1993.  
 Founder and President, Policy Economics Group, 1983 to 1987.  
 Deputy Director, Office of Tax Analysis, U.S. Department of the Treasury, 1979 to 1983.  
 Assistant Director, 1978 to 1979; Fiscal Economist, 1972 to 1976.  
 Chief Economist, New York State Economic Development Board, 1977 to 1978.  
 Staff Economist, Congressional Joint Committee on Taxation, 1976.

Staff Economist, American Enterprise Institute for Public Policy Research, 1972.

**Education:**

Ph.D., Economics, Clark University, 1973.

M.A., Economics, Clark University, 1972.

B.S., Mathematics, State University of New York - Potsdam, 1970.

**Legal Experience and Testimony:**

National Gypsum Company Bankruptcy Proceedings, 1991

Deposition

Testimony

Gerald Ahern, et. al. vs. Fiberboard Corporation, et. al., 1994

Deposition

Testimony

Ezell Thomas, et. al. vs. R.J. Reynolds Tobacco Company, et. al., 1999

Deposition

Fiberboard Corporation and Owens Corning vs. R.J.Reynolds Tobacco Company, et. al., 1999

Deposition

Western Mac Arthur Company and Mac Arthur Company vs. General Accident Insurance Co. of America; United States Fidelity & Guaranty Co.; Argonaut Insurance Company, 1999

Affidavit

CSX Transportation, Inc. and American Home Ins. Co., 2000

Deposition

ADR Proceeding Celotex vs. Travelers Casualty and Surety Co. and London Market Insurers, 2000

Deposition, 2004

Testimony, 2004

Owens Corning Bankruptcy Proceedings, 2001

Deposition, 2004

Trial Testimony, 2005

Michael Albanese vs. Compaq Computer Corporation, 2002

Affidavit

ADR Proceeding ACandS, Inc. vs. Travelers Casualty and Surety Co., 2003

ASARCO vs

Deposition, 2003

Western Mac Arthur Company and Mac Arthur Company Bankruptcy Proceedings, 2003

Oglebay Norton Bankruptcy Proceedings, 2004

Deposition, 2004

Trial Testimony, 2004

Halliburton Bankruptcy Proceedings, 2004

Congoleum vs Ace Ins. Et al, 2005

Deposition, 2005

Trial Testimony, 2006

Gene B. Griego, et al., Plaintiffs, vs. Bechtel National, Inc. et al., Defendants

Deposition, 2005

Sandra Sue Fullen, et al, Plaintiffs v. Philips Electronics North America Corporation, a Delaware corporation, et al., Defendants

Deposition, 2005

St. Paul Fire and Marine Insurance Company, Plaintiff, vs. A.P.I., Inc., Defendant and Counter-Claimant

Deposition, 2005

Dana Corporation Bankruptcy Proceedings, Case No. 06-10354(BLR), 2007

Deposition, 2007

Trial Testimony, 2007

API, INC. Asbestos Settlement Trust v. Atlantic Mutual Insurance Company; Civil No. 09-0665 (JRT/JJG); United States District Court, D. Minnesota; July 9, 2010.

Deposition, 2010

Applebee's International, Inc., DineEquity, Inc. and Weight Watchers International, Inc. Sheree Shepard and Anthony Watts, On Behalf of Themselves and All Others Similarly Situated vs. DineEquity, Inc. et al.; United States District Court; District of Kansas; No. 08-cv-2416.

Deposition, 2010

API, Inc. Asbestos Settlement trust, et al. v. Zurich American Insurance Company, et al. Court File No. 09-CV-975 (JRT/JJG)

Deposition, March 29, 2011

Tronox Incorporated, Tronox Worldwide, LLC f/k/a; Kerr-McGee Chemical Worldwide LLC, and Tronox, LLC, f/k/a Kerr-McGee Chemical LLC vs. Anadarko Petroleum Corporation and Kerr-McGee Corporation

Deposition 2012

Specialty Products Holding Corp., et al Bankruptcy proceedings, Case No. 10-11780(JFK), 2012

Deposition, 2012

Trial Testimony, 2013

Fundamental Long Term Care, Inc., Debtor; The Estate of Juanita Amelia Jackson, et al, v. General Electric Capital Corporation, et al; Case No.: 8:11-bk-22258-MGW Chapter 7; United States Bankruptcy Court, Middle District of Florida, Tampa Division.

Deposition, 2014

Trial Testimony, 2014

# Exhibit B

(For the NFL Concussion Liability Forecast, Dated February 10, 2014, See Exhibit 1)

# Exhibit KK



**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS'  
CONCUSSION INJURY LITIGATION

Kevin Turner and Shawn Wooden, on behalf of themselves  
and others similarly situated,

Plaintiffs,

v.

National Football League and NFL Properties LLC,  
successor-in-interest to NFL Properties, Inc.,

Defendants.

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

CIVIL ACTION NO: 2:14-cv-  
00029-AB

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**DECLARATION OF CLAIMS ADMINISTRATOR, ORRAN L. BROWN, SR.**

ORRAN L. BROWN, SR. declares, pursuant to 28 U.S.C. § 1746, based upon his personal knowledge, information and belief, the following:

1. I am an adult over twenty-one years of age. I am the Chairman and a founding partner of BrownGreer PLC ("BrownGreer"), located at 250 Rocketts Way, Richmond, Virginia 23231. I have personal knowledge of the facts set forth herein and if called and sworn as a witness, I could and would testify competently to all matters contained herein.

2. In connection with the class action settlement ("Settlement") in this case, the Court appointed BrownGreer as the Claims Administrator, tasked with, *inter alia*, administering the registration and claims processes and providing supplemental notices to the Class Members as to various administrative matters and deadlines, as directed by the Court and the Settling Parties. As part of my role, I am responsible for managing registrations by Class Members.

3. The attached Exhibit reflects daily registrations, as of April 3, 2017.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of April, 2017.

Arb. B. H.

Orran L. Brown, Sr.

| Registrations by Day |           |                             |                         |                     |       |
|----------------------|-----------|-----------------------------|-------------------------|---------------------|-------|
|                      | Date      | Retired NFL Football Player | Representative Claimant | Derivative Claimant | Total |
| 1.                   | 2/6/2017  | 1,026                       | 17                      | 91                  | 1,134 |
| 2.                   | 2/7/2017  | 593                         | 25                      | 56                  | 674   |
| 3.                   | 2/8/2017  | 877                         | 27                      | 98                  | 1,002 |
| 4.                   | 2/9/2017  | 434                         | 16                      | 56                  | 506   |
| 5.                   | 2/10/2017 | 977                         | 38                      | 63                  | 1,078 |
| 6.                   | 2/11/2017 | 96                          | 1                       | 29                  | 126   |
| 7.                   | 2/12/2017 | 318                         | 2                       | 17                  | 337   |
| 8.                   | 2/13/2017 | 413                         | 12                      | 61                  | 486   |
| 9.                   | 2/14/2017 | 387                         | 12                      | 109                 | 508   |
| 10.                  | 2/15/2017 | 485                         | 13                      | 34                  | 532   |
| 11.                  | 2/16/2017 | 462                         | 11                      | 81                  | 554   |
| 12.                  | 2/17/2017 | 300                         | 3                       | 37                  | 340   |
| 13.                  | 2/18/2017 | 76                          | 4                       | 13                  | 93    |
| 14.                  | 2/19/2017 | 62                          | 1                       | 8                   | 71    |
| 15.                  | 2/20/2017 | 154                         | 10                      | 12                  | 176   |
| 16.                  | 2/21/2017 | 340                         | 12                      | 38                  | 390   |
| 17.                  | 2/22/2017 | 196                         | 12                      | 33                  | 241   |
| 18.                  | 2/23/2017 | 93                          | 18                      | 16                  | 127   |
| 19.                  | 2/24/2017 | 228                         | 7                       | 35                  | 270   |
| 20.                  | 2/25/2017 | 32                          | 0                       | 6                   | 38    |
| 21.                  | 2/26/2017 | 31                          | 0                       | 6                   | 37    |
| 22.                  | 2/27/2017 | 73                          | 7                       | 20                  | 100   |
| 23.                  | 2/28/2017 | 101                         | 5                       | 12                  | 118   |
| 24.                  | 3/1/2017  | 111                         | 8                       | 13                  | 132   |
| 25.                  | 3/2/2017  | 134                         | 5                       | 26                  | 165   |
| 26.                  | 3/3/2017  | 87                          | 3                       | 16                  | 106   |
| 27.                  | 3/4/2017  | 21                          | 1                       | 4                   | 26    |
| 28.                  | 3/5/2017  | 19                          | 0                       | 3                   | 22    |
| 29.                  | 3/6/2017  | 218                         | 18                      | 15                  | 251   |
| 30.                  | 3/7/2017  | 109                         | 9                       | 29                  | 147   |
| 31.                  | 3/8/2017  | 105                         | 9                       | 19                  | 133   |
| 32.                  | 3/9/2017  | 128                         | 7                       | 14                  | 149   |
| 33.                  | 3/10/2017 | 125                         | 5                       | 30                  | 160   |
| 34.                  | 3/11/2017 | 63                          | 3                       | 24                  | 90    |
| 35.                  | 3/12/2017 | 61                          | 1                       | 11                  | 73    |
| 36.                  | 3/13/2017 | 139                         | 12                      | 30                  | 181   |
| 37.                  | 3/14/2017 | 97                          | 8                       | 25                  | 130   |
| 38.                  | 3/15/2017 | 157                         | 5                       | 25                  | 187   |
| 39.                  | 3/16/2017 | 236                         | 0                       | 172                 | 408   |
| 40.                  | 3/17/2017 | 73                          | 8                       | 10                  | 91    |

|     |           |        |     |       |        |
|-----|-----------|--------|-----|-------|--------|
| 41. | 3/18/2017 | 21     | 2   | 4     | 27     |
| 42. | 3/19/2017 | 26     | 0   | 11    | 37     |
| 43. | 3/20/2017 | 79     | 4   | 23    | 106    |
| 44. | 3/21/2017 | 124    | 10  | 36    | 170    |
| 45. | 3/22/2017 | 96     | 11  | 14    | 121    |
| 46. | 3/23/2017 | 68     | 6   | 12    | 86     |
| 47. | 3/24/2017 | 139    | 4   | 29    | 172    |
| 48. | 3/25/2017 | 34     | 4   | 5     | 43     |
| 49. | 3/26/2017 | 68     | 3   | 12    | 83     |
| 50. | 3/27/2017 | 126    | 7   | 13    | 146    |
| 51. | 3/28/2017 | 178    | 5   | 10    | 193    |
| 52. | 3/29/2017 | 70     | 9   | 15    | 94     |
| 53. | 3/30/2017 | 56     | 9   | 10    | 75     |
| 54. | 3/31/2017 | 53     | 10  | 7     | 70     |
| 55. | 4/1/2017  | 13     | 2   | 7     | 22     |
| 56. | 4/2/2017  | 17     | 0   | 8     | 25     |
| 57. | TOTALS    | 10,805 | 441 | 1,613 | 12,859 |

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN OF PENNSYLVANIA**

|                                                                               |                                                |                                                                             |
|-------------------------------------------------------------------------------|------------------------------------------------|-----------------------------------------------------------------------------|
| <b>IN RE: NATIONAL FOOTBALL<br/>LEAGUE PLAYERS’ CONCUSSION<br/>LITIGATION</b> | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | No. 12-md-2323 (AB)<br><br><br><br><br><br><br><br><br><br><br>MDL No. 2323 |
| <b>THIS DOCUMENT RELATES TO:<br/>ALL ACTIONS</b>                              | §<br>§<br>§                                    |                                                                             |

**Alexander Objectors’ Response and Objection to Supplemental Evidence  
Offered in Co-Lead Class Counsel’s Omnibus Reply in Opposition to  
Co-Lead Class Counsel’s Petition for an Award of Attorneys’ Fees  
Reimbursement of Costs and Expenses, Adoption of a Set-Aside of  
Each Monetary Award Derivative Claimant Award, and Case  
Contribution Awards for Class Representatives**

Co-Lead Class Counsel, in its Omnibus Reply, submitted supplemental evidence in support of its Petition for an Award of Fees. The Alexander Objectors object to the new evidence as follows:

**A. Dr. Vasquez’ April 10, 2017 Updated Analysis of the NFL Concussion Settlement (Exhibit JJ) Still has Analytic Gaps and Provides No Basis to Value the Monetary Award Fund**

In his new report, Dr. Vasquez states that he has now “been asked by Co-Lead Class Counsel to value the Settlement, as implemented.”<sup>1</sup> Dr. Vasquez

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<sup>1</sup> It appears from this statement in Dr. Vasquez’ April, 2017 report that Co-Lead Class Counsel had not previously asked Dr. Vasquez to apply his methodology to value the Settlement, as implemented. As such, and for this additional reason, Co-Lead Class Counsel’s initial Petition for Fees rested upon no foundation as Dr. Vasquez’ 2014 report did not even undertake to value the Settlement proposed and no other witness with any qualification offered an opinion on the subject.

presents his methodology as: The life cycle forecasting mode. He further states the methodology is based upon “disease incidence rates.” Thus, this new analysis suffers the same insurmountable flaw as Dr. Vasquez’ initial declaration: There is not and could not be disease incidence rates for Level 1.5 and Level 2 Qualifying Diagnoses. Neither Dr. Vasquez nor Co-Lead Class Counsel even address this flaw in methodology in the new report or Omnibus Reply.

Once again, Dr. Vasquez claims to be able to compute the probability that a former NFL player will contract “each one of the compensable injuries through an epidemiological risk equation.” But, we know that Dr. Vasquez has not actually performed an “epidemiological risk equation” for Level 1.5 or Level 2 because, as his first report acknowledges, there is no epidemiological data for Level 1.5 or Level 2 Qualifying Diagnoses. These Qualifying Diagnoses are creations exclusively of and defined entirely by the Settlement. Neither a Level 1.5 nor a Level 2 neurocognitive disorder appear in published literature, research or even a medical textbook. Yet, almost one-half of the NFL players Dr. Vasquez projected as eligible fall within the Qualifying Diagnosis of Level 2. *See* Table 2-1 (Doc. 6167, 6/71).

The Court will recall that in Dr. Vasquez’ 2014 report, upon which he still relies for incidence, Dr. Vasquez stated that he drew his incidence data from published literature and research as set forth in Exhibit A to that report. But, his

Exhibit A contained no published literature or research on the non-terminal neurocognitive disorders Level 1.5 and Level 2; that is because these Qualifying Diagnoses are not recognized diseases. Thus, the glaring analytical gap is this: Dr. Vasquez uses dementia studies as a surrogate or a “proxy” to Level 1.5 and Level 2 without supplying any analysis or basis for doing so. It is not clear that Dr. Vasquez has the qualifications to fill the gap, but Dr. Vasquez simply skips this step altogether.

The gap renders the opinion unreliable. More importantly, either gap causes the opinion to grossly over estimate the number of likely participants in the Settlement. Specifically, not only are the diagnosing criteria for dementia and Level 1.5 or Level 2 “materially different,” but also the dementia diagnosing criteria—those specifically used in the studies relied upon by Dr. Vasquez—are satisfied by “subjective impairment in social or occupational functioning.” *See* Declaration of Jamshid Lotfi, Md., attached hereto as Exhibit A. As Dr. Lotfi explains, unlike the lower requirements for a dementia diagnosis, the diagnosing criteria for Level 1.5 and Level 2 include a “neuropsychological battery testing protocol” established by Exhibit 2 to the Settlement; “quantification of the standard deviations below the person’s expected level of premorbid functioning.” *See* Declaration of Jamshid Lotfi, Md., attached hereto as Exhibit A. In short, it is wholly unreliable to rely upon the incidence data for dementia diagnosis for

extrapolating incidence for Settlement diseases that require satisfaction of multiple forms of different, objective criteria and evidence to support it.<sup>2</sup>

In fact, Co-Lead Class Counsel supplies the best evidence of this analytical gap on Level 1.5 and Level 2 Qualifying Diagnoses; that is, the new medical manuals published by Co-Lead Class Counsel and the NFL Parties. Specifically, because the Level 1.5 and Level 2 Qualifying Diagnoses are “settlement diagnoses” that were not taught in medical school, have never been diagnosed by a single physician outside of this Settlement, and have no recognized criteria, the Settlement calls upon the parties to write “medical manuals.” Mr. Seeger reveals in his new declaration that the “manuals that will be used by each of the administrators to train the physicians and providers on the medical aspects of the settlement, including the testing regimen [ ] and what constitutes a Qualifying Diagnosis for the MAF” have only just been completed. *See* Supplemental Declaration of Christopher A. Seeger, 7464-1, ¶ 30. Stated differently, if these diagnoses and their incidence was so well recognized, why have the BAP Administrator, the Claims Administrator, the NFL Parties and their experts, and Class Counsel collaborated to write medical manuals to teach doctors how to diagnose under the Settlement.

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<sup>2</sup> Of course, the Court will recall that the qualifying disease “diagnosing criteria” is a moving target, depending upon whether the diagnosis is made before or after the effective date of the Settlement. Note, too, that Dr. Vasquez makes no attempt to account for this differential, an additional gap in his analysis.



It is rank speculation at this point how many former NFL Players who present to these newly designated “Qualified MAF Physicians” using their newly published medical manuals will fall within the criteria for Level 1.5 or Level 2. And, certainly Dr. Vasquez gives no indication that he has ever undertaken to review the brand new manual or how it impacts his forecast. Dr. Vasquez’ incidence opinion; his prediction about how many “valid claims” will exist; and his resulting valuation of the Settlement, “as implemented” rests upon an analytic gap that renders the opinion completely unreliable and inadmissible. The Alexander Objectors object and ask the Court to strike or disregard that opinion under Rule 702 and *Daubert*.

Further, the Alexander Objectors ask that the Court recognize that this methodology challenge is not a challenge to the Settlement, as Co-Lead Class Counsel attempts to construe it. There is a fundamental difference between reliance upon an optimistic Dr. Vasquez report to ensure that the Settlement funds are sufficient to compensate Class members and relying upon that same optimism to reward above fees actually incurred for a successful Settlement before success is proven, or even a track record of success is established. It will be of absolutely no consequence that the MAF is uncapped if few former players can qualify under the new “medical manual”—referred to as a “user manual” in Exhibit 2 to the Settlement Agreement. And, if the Court has already awarded the entire \$112.5

fee fund as a bonus—instead of the \$40 million Co-Lead Class Counsel alleges has been reasonably incurred in fees—none of that fee fund can be recovered if the Settlement does not prove as successful as claimed and no portion of that fund can be invested to generate earnings for future fees.<sup>3</sup>

Co-Lead Class Counsel recoils at the suggested application of a lodestar to pay their \$40 million in fees to date, urging this case is not a statutory fee shift. But, Co-Lead Class Counsel attempts to obscure that this is not a common-fund settlement, either. Here, the NFL parties are funding attorneys' fees in precisely the same fashion they would if it were a statutory fee shift. But, if Co-Lead Class Counsel succeeds in draining that fund of not just fees earned but also a premature performance bonus, then subsequent fees will come out of the retired NFL players' recovery.

Recall, too, that the Settlement provides the NFL parties every incentive to resist or oppose every Qualifying Diagnoses. But, if Class Counsel is paid all fees and a bonus fee before a single player is declared eligible for Settlement funds,

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<sup>3</sup> After all, if the Court paid Co-Class Counsel its approximately \$40 million lodestar now, the \$72.5 million remaining would exceed the sum Co-Class Counsel seeks as a 5% set aside. Moreover, the \$72.5 million, conservatively invested, would more than adequately compensate counsel for administration-of-settlement fees. Meanwhile, the Court could simply escrow 5% of every claim payment to insure that the \$112.5 million is sufficient. No one is suggesting Co-Lead Class Counsel wait 65 years to be paid or for their success to be objectively measured; they simply should not get a bonus before a single former player has received any money.

Class Counsel has no incentive to advance these players' interests.

**B. Mr. Seeger's Supplemental April, 2017 Declaration, though objectionable for lack of detail, proves the Alexander Objectors' Point: Class Counsel's request for a performance bonus is premature and will unjustly enrich Class Counsel.**

Through his supplemental declaration Mr. Seeger yields to the "objectors demand for more detail" on the legal work that will be required to administer the Settlement for its life expectancy. A cursory review of the extensive work Mr. Seeger is doing and predicts he will do confirms that— notwithstanding Settlement—the true adversarial process is just about to begin. As the cliché goes, the devil will be in these details:

- Drafting—with the NFL Parties—of "[m]anuals that will be used by each of the administrators to train the physicians and providers on the medical aspects of the settlement and the unique diagnoses created thereunder;"
- Vetting and creation—with the NFL Parties—of the Appeals Advisory Panel to perform, *i.e.* benefit determinations; and
- Crafting—with the NFL Parties—the "basic form" and "supporting forms that need to be submitted to perfect a claim."

The upcoming adversarial, claims process is probably why Mr. Seeger—alleging that he has "invested over \$600,000" to achieve the Settlement—now seeks a 5% set aside<sup>4</sup> from every claimant, represented by counsel or not. That is,

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<sup>4</sup> The Alexander Objectors continue to discuss the "set-aside" in the same terms as the Settlement. The Court should note, however, that Co-Lead Counsel has not actually petitioned for a set aside; they have petitioned for "a 5% set-aside concept" Class Counsel wishes to

by Class Counsel's calculation, an additional \$50 million in attorney administration fees. Either the Settlement is already successful and the performance bonus has been earned, or, as Mr. Seeger seems to be saying, he has a lot of work to do to make the Settlement a success.

Nevertheless, the Alexander Objectors object to Mr. Seeger's declaration because, for the lack of tangible data supplied, it is conclusory and lacks foundation. Specifically Mr. Seeger's declaration is offered to support a full 5% set aside<sup>5</sup> but it does not contain any fee data, *i.e.* projected fees on an annual basis. Co-Class Counsel asked the Claims Administrator to project its potential administrative costs "over the 65-year life of the Settlement Program." *See*

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administer on a plan that Co-Lead Class Counsel has not yet shared with the Court or any other party. *See*, Declaration of Christopher A. Seeger, Doc. 7151-2, paragraph 119. The proposal-to-come sounds much like "the plan" for fees that Co-Lead Class Counsel submitted early in the litigation – Case Management Order No. 5. As none of the data ordered to be accumulated and filed appears in the file of this Court or has been offered as evidence of fees in Co-Lead Class Counsel's request for fees, the promise to create and follow through with a plan for future fees rings hollow.

<sup>5</sup> The alleged need for an immediate 5% set aside is logically defeated by Co-Lead Class Counsel's representations to the Court about prior versions of the Settlement. Specifically, the January, 2014 Settlement proposal capped the MAF at \$675 million; provided for an additional \$112.5 million in attorneys fees from the NFL parties; and contained **no set aside**. *See* Doc. 5634-2. Co-Lead Class Counsel, in reliance upon Dr. Vasquez' original report, represented that these terms would adequately protect all of the Class Members forecast as eligible. Subsequently, according to Mr. Seeger (ECF 7151-2, paragraph 43), Co-Lead Class Counsel "tightened definitions of key terms" in the Settlement – a revision that reduced the number of eligible participants – negotiated an uncapped MAF; and added a set aside up to 5%. Co-Lead Class Counsel has never explained why \$50 million more in fees is necessary to administer fewer eligible claims than provided for in January, 2014.

Declaration of Orran L. Brown, Sr., 7151-4, ¶ 10. And, although it was a speculative projection, Mr. Brown tried. Co-Class Counsel asked Dr. Vasquez to value the Settlement over its life expectancy. *See* Updated Analysis of the NFL Concussion Settlement, 7464-12, Exhibit JJ. And, although it is a speculative projection, Dr. Vasquez tried.

Mr. Seeger, by contrast, sweeps broadly through the categories of extensive work he anticipates without any actual fee projection—and, thus, his declaration is conclusory and without foundation. Mr. Seeger urges the Court, instead, to simply vest him with the future authority—upon a protocol not even yet submitted—to evaluate and pay fees incurred to administer the settlement. The Court should reject the supplemental declaration, and the 5% holdback it advances.

### **C. The Declaration of Bradford R. Sohn, 7464-2, Exhibit Z**

The Alexander Objectors, obliged to object when proffered evidence is infirm, again complain of a substandard fee declaration:

|                                                      |                                                                                                                                                                                                                                                                                                                      |
|------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Declaration of<br>Bradford R. Sohn<br>ECF No. 7464-2 | Fed. R. Civ. P. 23(h) authorizes the award of “reasonable attorney fees.” Mr. Sohn’s declaration seeks an award of attorney fees in reliance upon 50 hours alleged worked for a total lodestar fee of \$26,250.00. Mr. Sohn does not testify that these hours billed are reasonable or necessary or non-duplicative. |
|------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

The Court still needs to know what this attorney and all of the other were

working on in order to satisfy Rule 23(h). Co-Lead Class Counsel knew that when it asked the Court to enter Case Management No. 5. Now, having failed to submit its substantiating data, Co-Lead Class Counsel asks that the Court rely upon its recollection of the services rendered since the inception of this litigation; and trust Mr. Seeger for the rest – for a new grand total of 50,962.39 hours approved by Mr. Seeger because “he deemed<sup>6</sup> all work being billed reasonable, necessary, and non-duplicative.”<sup>7</sup> See ECF No. 7152-2 at ¶¶ 72-73, 75-76 and repeated in the Omnibus Reply. Co-Lead Class Counsel cannot, by deeming these hours reasonable, necessary, and non-duplicative, substitute his conclusory opinion for evidence or his judgment for that of this Court.

### PRAYER

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<sup>6</sup> Mr. Seeger also apparently “deemed” that common-benefit work he requested be (a) performed by and (b) submitted by counsel for the Alexander Objectors not to be worthy of submission. Specifically, Class Counsel solicited Lance Lubel to meet in Florida and in New York to assist on behalf of all objectors to discuss options in an attempt to avert appeal. Counsel incurred time and expense responding to these requests. Counsel submitted reports of, *inter alia*, this time and expense in response to Mr. Seeger’s July 25, 2016 request for common benefit submissions. Mr. Seeger did not submit those materials to the Court. Additionally, he fails to address discussions between Co-Lead Class Counsel and the Alexander Objectors’ lawyer regarding ambiguities in the initial settlement agreement, which were later rectified in a subsequent agreement.

<sup>7</sup> The Alexander Objectors contemporaneously seek leave of this Court to conduct limited discovery on the conclusory matters within Co-Lead Class Counsel’s Petition for Fees to (a) aid the Court in conducting a meaningful review of the submission and (b) to provide the Alexander Objectors with a meaningful opportunity to object to the submission. As previously outlined in the Alexander Objectors’ Motion for Entry of Case Management Order Governing Applications for Attorneys Fee (ECF 7176) and the Alexander Objectors’ Objections to the Petition (ECF 7355), there is no possibility that the Court can find or the Alexander Objectors can determine whether the hours billed are duplicative or in accordance with Case Management Order No. 5 in the absence of this discovery.

For the reasons set forth herein, and in their Alexander Objectors' objections and response in Opposition to Co-Lead Class Counsel's Petition, the Alexander Objectors ask the Court to deny or defer Class Counsel's Petition and enter a Case Management Order establishing filing deadlines and a schedule for submission of data in support of common-benefit fee petitions in accordance with Article XXI Of the Settlement.

Date: April 21, 2017

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on April 21, 2017.

/s/ Justin R. Goodman



**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN OF PENNSYLVANIA**

|                                                                               |                                                |                                                                             |
|-------------------------------------------------------------------------------|------------------------------------------------|-----------------------------------------------------------------------------|
| <b>IN RE: NATIONAL FOOTBALL<br/>LEAGUE PLAYERS' CONCUSSION<br/>LITIGATION</b> | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | No. 12-md-2323 (AB)<br><br><br><br><br><br><br><br><br><br><br>MDL No. 2323 |
| <b>THIS DOCUMENT RELATES TO:<br/>ALL ACTIONS</b>                              |                                                |                                                                             |

**ALEXANDER OBJECTORS' MOTION FOR LEAVE  
TO SERVE FEE-PETITION DISCOVERY**

The Alexander Objectors respectfully submit the following and request that the Court grant leave to the Alexander Objectors to serve Requests for Production of Documents pursuant to Fed. R. Civ. P. 34 and, in support, would show as follows:

**I. The Court has Insufficient Information to Perform the Third Circuit's "Thorough Review" of Co-Lead Class Counsel's Petition for an Award of Attorneys' Fees, Reimbursement of Costs and Expenses, Adoption of A Set-Aside of Five Percent of Each Monetary Award and Derivative Claimant Award ("Co-Lead Class Counsel's Fee Petition")**

A district court must conduct a "through judicial review" of a fee application in a class action settlement. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 (3d Cir. 1995). Attempting the review without adequate procedures or bases for an award is, standing alone, an abuse of discretion. *See In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727 (3d Cir.

2001).

To date, Class Counsel has advanced nothing more than an *ipse dixit* as a basis for an award of fees: Mr. Seeger states that he “deemed all work being billed reasonably, necessary, and non-duplicative.” *See* ECF No. 7152-2 at ¶¶ 72-73, 75-76. It is an insufficient basis for making an award of \$112.5 million and withholding an additional 5% from every Class Member. The Alexander Objectors previously requested the entry of a Case Management Order that would permit the Court to vet the reasonableness of the fees through careful consideration of objections, along with an opportunity to seek information to develop those objections. *See* ECF 7176; *see also In re Baby Products Antitrust Litigation*, 708 F.3d 163, 177 (3d Cir. 2013) (noting that it is appropriate for the Court to address issues raised in objections to fee award). To date, Co-Lead Class Counsel has failed or refused to submit data that would form a basis for the Court to review Co-Lead Class Counsel’s Fee Petition. Therefore, the Alexander Objectors now specifically request leave to serve discovery pursuant to Fed. R. Civ. P. 34

**II. The Court Should Permit the Alexander Objectors to Serve Requests for production of Documents that form the basis of Co-Lead Class Counsel’s statements in support of (a) \$112.5 in attorneys fees; and (b) a full 5% set aside from every award from the Settlement.**

In order that the Court will have a sufficient basis to review Co-Lead Class Counsel’s Fee Petition and the Alexander Objectors will have meaningful opportunity to object to Co-Lead Class Counsel’s Fee Petition, the Alexander

Objectors seek leave to serve the following document requests:

1. Any and all documents prepared or submitted pursuant to Case Management Order No. 5, including but not limited to requests for extension of time to file reports or other formal or informal requests for relief from Case Management Order No. 5.
2. Every “Detailed Time Report” prepared in accordance with Case Management Order No. 5.
3. Every senior partner or shareholder certification of accuracy for time and expense entries prepared in accordance with Case Management Order No. 5.
4. Every document that pertains to an Interim Litigation Fund.
5. Every document reflecting an audit of a common-benefit time or expense report.
6. Any and all “contemporaneous daily time records regularly prepared and maintained” for any common-benefit fee award sought by any attorney pursuant to Co-Lead Class Counsel’s Fee Petition.
7. Any and all “expense vouchers, check records, and other source material” that substantiates the record of expenses incurred by counsel seeking common benefit expenses.
8. Any and all documents submitted to Seeger Weiss per Mr. Seeger’s July, 2016 letters to “Counsel” concerning requests for common benefit time as described in that letter:
  - a. Every submission of “a report of a full, itemized list of each and every common benefit task with important supporting information”;
  - b. Every submission of “a report for total time and fees by task category”;
  - c. Every submission of “a report for each expense incurred for the common benefit with important supporting information.”

- d. Every “Time and Expense Reporting” spreadsheet submitted.
9. Any and all communications between plaintiffs’ class counsel and lawyer or firm submitting common benefit time in Request No. 8 above pertaining to those submissions.
  10. Any and all drafts of attorney declarations prepared in connection with Co-Lead Class Counsel’s Fee Petition.
  11. Any document that reflects contemporaneous recording of common-benefit time by any attorney seeking fees as part of Co-Lead Class Counsel’s Fee Petition.
  12. Any and all documents reflecting the review of common-benefit submissions by “attorneys and staff working at [Mr. Seeger’s] direction.” (ECF 7151-2, ¶ 75)
  13. Any document that reflects a segregation of “time and expenses that inured [only] to the common benefit of the Class.” (ECF 7151-2, Paragraph 76).
  14. Any and all documents reflecting the division of hours or segregation of time between contingency contract clients and common benefit time for the firms seeking common benefit fees.
  15. Any and all documents submitted by parties or their lawyers to the Court or any Special Master that refer or relate to forecasts or predictions of number of class members who are estimated to be eligible for Settlement funds and/or the funds necessary to adequately fund the settlement.
  16. Any and all documents that refer or relate to the attorneys fee negotiations between the parties regarding the set aside provision in the Settlement, including any document pertaining to the negotiation of a decision to modify the proposed settlement to add or include a set aside or hold back of up to 5% from any monetary award.
  17. Any and all documents that refer or relate to the reasons the attorneys fee agreement between the parties was changed after the January 6, 2014 agreement was submitted for court approval.

18. Any and all documents reflecting the reasons for any changes to the settlement agreement after the January 6, 2014 agreement was rejected without prejudice.
19. Any and all documents sent to or received from Thomas Vasquez concerning this matter.

### **PRAYER**

For these reasons, the Alexander Objectors respectfully request the Court enter an order granting them leave to serve on Co-Lead Class Counsel the above-referenced discovery requests pursuant to Fed. R. Civ. P. 34.

Date: April 21, 2017

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on April 21, 2017.

/s/ Justin R. Goodman

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB  
MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Civil Action No. 2:14-cv-00029-AB

Plaintiffs,

V.

National Football League and  
NFL Properties, LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**FANCA OBJECTORS' REPLY IN SUPPORT OF THEIR  
PETITION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES**

The Faneca Objectors submit this Reply in Support of Their Petition for an Award of Attorneys' Fees and Expenses to address issues relevant to their petition.<sup>1</sup>

<sup>1</sup> The Faneca Objectors submit this reply pursuant to this Court's Policies and Procedures, General Motion Practices ¶2. This reply responds to Co-Lead Class Counsel's Omnibus Reply Memorandum in Further Support of Petition for Award of Attorneys' Fees and Reimbursement of Expenses, Adoption of Set-Aside from Monetary and Derivative Claimant Awards, and Case Contribution Awards for Class Representatives, and in Opposition to Objectors' Cross-Petitions for Awards of Attorneys' Fees and Expenses, Dkt. 7464; Petition of Objectors Preston and Katherine Jones for Award of Attorneys' Fees for Successful Efforts To Improve the Settlement for NFL Europe League Players, Dkt. 7364; and Curtis L. Anderson's Second Supplemental Objection to Class Counsel's Fee Petition, Dkt. 7370.

## ARGUMENT

### **I. The Faneca Objectors Worked To Improve the Settlement, Not To Derail It**

“I just want to be absolutely clear up front, we want a settlement. There’s no question we want a settlement.” Dkt. 6463 at 69:8-10. So began the fairness hearing argument of counsel for the Faneca Objectors.

This sentiment was conveyed in the words and the actions of the Faneca Objectors throughout these proceedings. In their very first filing, they sought to *strengthen the settlement*, requesting intervention “for purposes of participating in settlement negotiations.” Dkt. 6019-1 at 27-28 (emphasis added). They reaffirmed their commitment to settlement in the opening line of their objection, “agree[ing] that ‘the interests of all parties would be best served by a negotiated resolution.’” Dkt. 6201 at 1. They did so again at the fairness hearing, Dkt. 6463 at 69:8-10, and also on appeal, Faneca CA3 Br. 62 (“The Faneca Objectors believe all parties would benefit from a settlement of this case.”). The Faneca Objectors did not attempt to “torpedo” or “block the Settlement.” Dkt. 7464 at 40. Rather, they aimed only to do what they ultimately did – improve the settlement and ensure its fairness, adequacy, and reasonableness through adversarial litigation.

The Faneca Objectors pursued that goal with deliberate speed, raising deficiencies early on and joining requests for expedited briefing. *See* Dkt. 7366 at 7 & n.5. Still, Co-Lead Class Counsel accuse the Faneca Objectors of delay, faulting them for appealing: “Nor were [the Faneca Objectors] content with improvements that they *now* extol and robustly value at anywhere from \$102.5 to \$120.4 million but, instead, appealed this Court’s final approval decision to the Third Circuit.” Dkt. 7464 at 40.<sup>2</sup> That attack is misplaced. Before appealing, the

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<sup>2</sup> To the extent Co-Lead Class Counsel suggest that the Faneca Objectors downplayed the value of their enhancements on appeal, that is false. The Faneca Objectors showed complete



Faneca Objectors negotiated directly with the NFL, hoping to secure further benefits for individuals with CTE and avoid appeal altogether. Dkt. 7070-1 at 18-19. Only when that effort did not succeed did they appeal. Those appellate proceedings – combined with the Faneca Objectors’ independent negotiations with the NFL – ensured that the Final Settlement was both fair, adequate, and reasonable under the law and the most generous settlement that could be had. Indeed, courts have found it “vital” that “unnamed class members who object to proposed settlements” have the opportunity “to appeal” to address issues that may be of benefit to the class. *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000). Denying the Faneca Objectors credit for the settlement enhancements they secured simply because they advocated for *further* improvements on appeal undermines that principle.

## **II. The Efforts of the Faneca Objectors Increased the Value of the Settlement by More Than \$100 Million**

Co-Lead Class Counsel oddly argue that the improvements did not result from the Faneca Objectors’ efforts. But this Court’s order suggesting those improvements shows otherwise. Co-Lead Class Counsel also attack the value of the Faneca Objectors’ improvements. But that challenge ignores evidence – much of it their own – and relies on faulty assumptions.

### **A. The Faneca Objectors Are Responsible for the Improvements to the Settlement**

As it was preliminarily approved, the Revised Settlement negotiated by Co-Lead Class Counsel did not guarantee a baseline assessment examination for every class member, did not provide Eligible Season credit for NFL Europe, limited Death with CTE payments to class members who died before preliminary approval, and charged financially needy class members a

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transparency. They acknowledged that the Final Settlement brought “[m]uch benefit . . . to the class.” Faneca CA3 Br. 1. They also stated that the improvements “substantially enhanced the benefits to the class” and could “exceed \$100 million” in value. *Id.* at 22. Tellingly, Co-Lead Class Counsel did not dispute that valuation before the Third Circuit.

\$1,000 appeal fee. The Faneca Objectors challenged each of those deficiencies and suggested revisions to cure them. Their briefs, oral arguments, and even charts used at the fairness hearing did so in detail. *See, e.g.*, Dkt. 7070-1 at 36-38; Dkt 6469 at 28, 33, 37. The Court ultimately agreed, urging the settling parties to address those deficiencies and “enhance the fairness, reasonableness, and adequacy of” the settlement. Dkt. 6479 at 1.

Co-Lead Class Counsel now claim that “the Court . . . proposed the changes” so the Faneca Objectors are not entitled to attorneys’ fees. Dkt. 7464 at 41. But the Court explained that it had “reviewed [among other things] . . . the objections to final approval of the Class Action Settlement filed by various objectors and their counsel . . . and the arguments . . . at the November 19, 2014 Fairness Hearing and the post-Hearing submissions.” Dkt. 6479 at 1. “***After reviewing these submissions and arguments,***” the Court continued, “I believe that the following changes would enhance the fairness, reasonableness, and adequacy” of the settlement. *Id.* (emphasis added); *see also In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 370 (E.D. Pa. 2015) (“*NFL Concussion I*”). The Court thus directly tied its suggested improvements to objectors’ submissions. And it was the Faneca Objectors’ submissions that first identified and most fully analyzed four of the five deficiencies highlighted by the Court. *See* Dkt. 7070-1 at 17. The Faneca Objectors are entitled to attorneys’ fees for that success. *See Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009) (reversing denial of objectors’ fees where district court “was not focused on” settlement’s deficiencies before objectors raised them but, following objection, addressed the deficiencies).

Co-Lead Class Counsel assert that courts “uniformly decline[] to award attorneys’ fees to objectors” where the court did not rely on objectors’ arguments or where objectors’ arguments paralleled the court’s. Dkt. 7464 at 41. Not so. It is “unfair to counsel when, seeking to protect

his client's interest and guided by facts apparent on the record, he spends time and effort to prepare and advance an argument which is ultimately adopted by the court, but then receives no credit therefor because the court was thinking along that line all the while.” *Green v. Transatron Elec. Corp.*, 326 F.2d 492, 498-99 (1st Cir. 1964). Similarly, a court cannot “den[y] a fee to objectors . . . on the ground that [it] had already decided, without telling anyone,” that the settlement was deficient. *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 288 (7th Cir. 2002). It would be patently unfair to force objectors to “decide whether to object without knowing what objections may be moot because they have already occurred to the judge.” *Id.* at 288.<sup>3</sup> Thus, even if the Court would have urged improvements without the assistance of the Faneca Objectors and the comprehensive evidentiary record they developed, the Faneca Objectors are still entitled to attorneys’ fees.<sup>4</sup>

## **B. The Evidence Supports the Faneca Objectors’ Valuation of the Improvements**

As the Faneca Objectors have explained, the changes to the settlement resulting from their advocacy are extremely valuable. Co-Lead Class Counsel admit that those changes are worth as much as \$45.8 million in additional award payouts. Dkt. 7464-12 at 3 & tbl. 1. But the

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<sup>3</sup> See also *Fraleigh v. Facebook, Inc.*, No. C 11-1726, 2014 WL 806072, at \*2 (N.D. Cal. Feb. 27, 2014) (fees appropriate “where an objector advances a point not previously made by other parties or objectors even if the Court would have *sua sponte* reached the same conclusion”); *Park v. Thomson Corp.*, 633 F. Supp. 2d 8, 11 (S.D.N.Y. 2009) (objectors “entitled to an award of fees even where the Court would have likely reached the same result, with or without the objectors’ comments”); *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ.6689, 2003 WL 22801724, at \*1 (S.D.N.Y. Nov. 24, 2003) (similar).

<sup>4</sup> None of the cases cited by Co-Lead Class Counsel (at 41-42) justifies denial of the Faneca Objectors’ fee request. Those cases did not involve complex and difficult issues like those the Faneca Objectors addressed here, and the objectors in those cases did not submit the sort of thorough and comprehensive analysis and evidence that the Faneca Objectors submitted. See, e.g., *In re Polyurethane Foam Antitrust Litig.*, 169 F. Supp. 3d 719, 721 (N.D. Ohio 2016) (rejecting fees for “boilerplate objections”); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 132 (S.D.N.Y. 2009) (rejecting fees for “general and repetitive” objections).

true value ranges from \$102.5 million to \$122.6 million. Dkt. 7070-1 at 20-28; Dkt. 7366-1 at 7.<sup>5</sup> While Co-Lead Class Counsel call that valuation “pure fantasy,” it is rooted in applicable law and evidence, including the opinion of valuation expert Joseph Floyd.<sup>6</sup>

**NFL Europe.** Co-Lead Class Counsel’s updated actuarial analysis for this improvement actually yields a ***higher valuation*** than what the Faneca Objectors’ expert predicts. Dr. Vasquez, Co-Lead Class Counsel’s actuarial expert, projects an additional \$41 million in payouts from the Monetary Award Fund to players in NFL Europe. *Compare* Dkt. 7464-12 at 7 (Vasquez Updated Analysis), *with* Dkt. 7366-1 at 10 (Floyd Declaration).<sup>7</sup>

**BAP Fund.** Co-Lead Class Counsel assign no value to the Final Settlement’s guarantee of a baseline assessment examination for every class member. Dkt. 7464-12 at 8. Dr. Vasquez, their actuary, concedes that the “increase in participation rates and the eligibility of European players is expected to increase the number of baseline exams, and their attendant costs.” *Id.* And he acknowledges that under certain “circumstance[s], . . . the combination of BAP exams and Supplemental Benefits [will] exhaust[] the \$75 million cap,” in which case “***the NFL parties***

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<sup>5</sup> The Faneca Objectors’ expert, Mr. Floyd, originally estimated the value of the improvements at \$120.4 million. As explained in the Supplemental Declaration of Mr. Floyd, attached hereto as Exhibit A, the increased participation rates from the Updated Analysis provided by Co-Lead Class Counsel increase that valuation by \$2.2 million, to \$122.6 million. Floyd Supp. Decl. at 2.

<sup>6</sup> By contrast, the Updated Analysis of Dr. Vasquez is not evidence. Unlike Mr. Floyd, Dr. Vasquez did not submit his expert report under penalty of perjury. Instead, the Updated Analysis was attached to a declaration by Co-Lead Class Counsel. That is not sufficient. *Cf. Fowle v. C&C Cola*, 868 F.2d 59, 67 (3d Cir. 1989) (rejecting as evidence in summary judgment proceedings expert report that was not attached to an affidavit or deposition of the expert, but submitted only with declaration of counsel).

<sup>7</sup> The Jones Objectors in their fee petition argue that the NFL Europe enhancements are worth only \$20 million. Dkt. 7364-1 at 5-6. They do not say how they arrived at that estimate, nor do they submit any expert or evidentiary support. *Id.* Their valuation is pure guesswork. They also discount the value on the assumption that not all class members from NFL Europe will register for the settlement. Dkt. 7364-1 at 5-6. For the reasons described below, *see pp. 17-19, infra*, that is inappropriate. *See* Dkt. 7633 at 10-16.

*will be required to fund a BAP Examination beyond the cap.”* *Id.* (emphasis added). Then, without explanation, he dismisses that possibility as “speculative.” *Id.*

Dr. Vasquez ignores that, in approving the Final Settlement, this Court relied on his earlier analysis in assuming that the “average BAP Supplemental Benefit per Retired Player will range from \$35,000 to \$52,000.” *NFL Concussion I*, 307 F.R.D. at 411. Indeed, that range comes directly from Dr. Vasquez’s declaration in support of Co-Lead Class Counsel’s motion for final approval. *See* Dkt. 6423-21 ¶28. As the Faneca Objectors explained, if supplemental benefits are maintained at the level this Court contemplated, then providing a baseline examination for every eligible class member *will inevitably* push payments from the BAP fund well beyond \$75 million. *See* Dkt. 7070-1 at 21-22; Dkt. 7366-1 at 5-7.<sup>8</sup> What Dr. Vasquez dismisses as “speculation” is, in fact, reality supported by evidence introduced by Co-Lead Class Counsel and incorporated in the findings of this Court.

**Death with CTE.** Co-Lead Class Counsel also undervalue the expanded Death with CTE benefit. They call the Faneca Objectors’ reliance on a 96% prevalence rate for CTE in the NFL population an “untenable assumption[.]” Dkt. 7464 at 43; *see also* Dkt. 7370 at 4. It is not. It is the calculated prevalence rate in retired NFL players for CTE as diagnosed through post-mortem autopsy by neuropathologists at Boston University’s Brain Bank.<sup>9</sup> That is precisely

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<sup>8</sup> Additionally, Dr. Vasquez’s assertion that the value of the BAP enhancement is “speculative” is conclusory and unsupported by any analysis. It carries no weight. *See Montgomery v. Mitsubishi Motors Corp.*, 448 F. Supp. 2d 619, 631 (E.D. Pa. 2006) (rejecting expert’s “conclusory statement”).

<sup>9</sup> *See* McKee *et al.*, *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 Brain 43, 59 (2013) (33 of 34, or 97%, of retired NFL players diagnosed with CTE); Breslow, *76 of 79 Deceased NFL Players Found To Have Brain Disease*, Frontline (Sept. 30, 2014), <http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/76-of-79-deceased-nfl-players-found-to-have-brain-disease/> (76 of 79, or 96.2%, of retired NFL players diagnosed with CTE); Breslow, *New: 87 Deceased NFL Players Test Positive for Brain Disease*, Frontline (Sept.

what the payment for Death with CTE compensates: a “post-mortem diagnosis of CTE made by a board-certified neuropathologist.” Dkt. 6481-1 Ex. 1 ¶5. Thus, the 96% prevalence rate is not an assumption; it is a measure of Death with CTE in the NFL population as ***Co-Lead Class Counsel themselves have defined the Qualifying Diagnosis***.

Indeed, it is Dr. Vasquez’s assumptions that are unrealistic. Dkt. 7464-12 at 8. He declares the prevalence rate of CTE in NFL retirees who died between 2010 and 2012 to be 7.55%. He calculates that rate by dividing the number of players who died and were later diagnosed with CTE, 32, by the total number of players who died, 424. But Dr. Vasquez’s calculation rests on two untenable assumptions: (1) He assumes that ***every player with CTE*** had his brain submitted for testing, and (2) he assumes that ***every player*** whose brain was not submitted was free of CTE. In fact, during the period 2010-2012, testing of players’ brains was just gaining momentum, and as testing has continued, the vast majority of them have tested positive for CTE.<sup>10</sup>

Co-Lead Class Counsel further assert that the Faneca Objectors have overvalued the Death with CTE benefit by failing to account for Qualifying Diagnoses that individuals who died with CTE may have received years earlier. Dkt. 7464 at 43 n.37; Dkt. 7464-12 at 8 n.6. But the purpose of the Death with CTE payment was to compensate “Retired Players who died prior to final approval [and who] ***did not have sufficient notice that they had to obtain Qualifying Diagnoses***.” *NFL Concussion I*, 307 F.R.D. at 397 (emphasis added); cf. Dkt. 6423-1 at 59-60.

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18, 2015), <http://www.pbs.org/wgbh/frontline/article/new-87-deceased-nfl-players-test-positive-for-brain-disease/> (87 of 91, or 95.6%, of retired NFL players diagnosed with CTE).

<sup>10</sup> Dr. Vasquez does not disclose the source of his data, but the time frame he selected (2010-2012) and the number of NFL players diagnosed with CTE (32) suggests that Dr. Vasquez is relying on Professor Ann McKee’s benchmark study *The Spectrum of Disease in Chronic Traumatic Encephalopathy*. McKee 2013, *supra* n.9. That study actually ***supports*** the Faneca Objectors’ 96% prevalence rate: Prof. McKee examined the brains of 34 former NFL football players and determined that 33 had CTE. *Id.* at 49-51, 59 & tbl. 2.

The individuals who pre-deceased approval of the Final Settlement thus had no reason to seek out a Qualifying Diagnosis.<sup>11</sup>

**Hardship Waiver of Appeal Fee.** Finally, Co-Lead Class Counsel assign no value to the appeal-fee hardship waiver. They assert that the Faneca Objectors’ \$10.9-million valuation rests on an “apples-to-oranges comparison” between the appeals process under the Final Settlement and the appeals process for the NFL disability program.<sup>12</sup> According to Co-Lead Class Counsel, the two are not comparable because the settlement will be run by an independent Court-appointed Administrator, and Class Counsel will have a “role in overseeing the Settlement’s implementation and ensuring fair treatment.” Dkt. 7464 at 44. But the NFL disability program is also independently run and subject to court supervision. “[A]ll claims and appeals for disability benefits are adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making the decision,” 29 C.F.R. § 2560.503-1(b)(7), and disability decisions “may be appealed to federal courts,” L. Elaine Halchin, Cong. Research Serv., RL34439, *Former NFL Players: Disabilities, Benefits, and Related Issues* 82 (2008).<sup>13</sup>

Thus, nothing suggests the rate of successful appeals will differ between the Final Settlement and the disability benefits program. If anything, the settlement may see *more* successful appeals. Under the Final Settlement, Co-Lead Class Counsel may appeal claim determinations on behalf of a class member or may file in support of a class member’s appeal. Dkt. 6481-1 §§ 9.5, 9.7(c). Co-Lead Class Counsel’s participation in the appeal process no doubt

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<sup>11</sup> Co-Lead Class Counsel also give no indication that any class member who died between preliminary and final approval actually received a diagnosis that could be deemed a Qualifying Diagnosis.

<sup>12</sup> Dr. Vasquez calls this effort “speculative” but gives no explanation or analysis why. Dkt. 7464-12 at 2 n.3. That conclusory assertion is not entitled to any weight. *See* p. 7 n.8, *supra*.

<sup>13</sup> *Available at* [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1530&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1530&context=key_workplace).



will ensure that most (if not all) questionable claim determinations are appealed and will likely lead to greater success on appeal. Thus, reliance on NFL disability benefits data therefore probably *understates* the number of successful appeals under the Final Settlement – and the value of eliminating the appeal fee in cases of financial hardship.

### **III. The Faneca Objectors’ Fee Request Is Reasonable**

The Faneca Objectors performed two valuable services for this Court and the class. They tested, through three years of hard-fought litigation, the fairness of a historic settlement of tremendous public interest. *See* Dkt. 7070-1 at 33-36. And they conferred between \$102.5 and \$122.6 million in additional monetary benefit to the class, without any guarantee of payment for their work. *Id.* at 36-39; Floyd Supp. Decl. at 2. The award they seek, between 16.3% and 19.5% of the benefit conferred, is eminently reasonable. Dkt. 7070-1 at 39-47.<sup>14</sup>

#### **A. The Faneca Objectors’ Litigation Efforts Were Extensive, Were Justified, and Should Not Be Devalued**

The improvements did not – and could not have – come easily. A settlement was negotiated early in the proceedings, after filing of the complaint and argument on a motion to dismiss raising one issue. The resulting Initial Settlement reflected an intricate set of trade-offs over complex legal and scientific issues – and yielded a substantial settlement valued at \$760 million. It was defended by some of the nation’s finest corporate defense lawyers and a team of highly experienced, highly credentialed plaintiffs’ lawyers. Any objector hoping to improve the settlement faced enormous challenges.

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<sup>14</sup> Where an objector’s efforts result in an increase in settlement value, courts routinely apply the percentage-of-recovery method to calculate objector fees. *See, e.g., McDonough v. Toys “R” Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015) (applying percentage-of-recovery method to calculate objector’s fee); *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 396 (D.N.J. 2012) (“[T]he Court concludes that a percentage-of-recovery analysis applies here to assess the objectors’ fee request.”).



Thus, the Faneca Objectors recognized that achieving real benefits for the class would require litigating the case as if they were parties. They had to understand the complex scientific and legal issues involved, build a record, and present arguments holding the settling parties to their burden of proof to justify the settlement’s “line drawing.”

With those considerations in mind, the Faneca Objectors moved to intervene, Dkt. 7070-1 at 8-9, opposed preliminary approval of the Revised Settlement, *id.* at 9-10, and petitioned the Third Circuit for early review of the preliminary-approval order, *id.* at 10-11. With those considerations in mind, the Faneca Objectors filed an extensive objection and supplemental briefing, *id.* at 11-14, recruited eleven leading neuroscientists to file declarations in support of their objection, *id.* at 12-13, 15-16, and filed motions seeking discovery, *id.* at 13-14. With those considerations in mind, they negotiated directly with the NFL, and when that failed, appealed to the Third Circuit. *Id.* at 18-20. When the Third Circuit affirmed, and it became apparent that they had achieved all they could, the Faneca Objectors stopped. They did not seek *en banc* review, nor did they file a petition for a writ of certiorari. *Id.* at 20.

Co-Lead Class Counsel try to devalue that effort, painting the Faneca Objectors as the sort of gadfly objectors who are heavily criticized by courts and commentators alike. *See, e.g.,* Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1797.4 (3d ed. 2017). They assert that the Faneca Objectors’ fee award should be reduced to exclude time spent on filings that did not succeed or contentions that the Court did not ultimately adopt. But that is wrong for two reasons.

***First, Co-Lead Class Counsel are wrong on the facts.*** As the Third Circuit explained, the Faneca Objectors made “well-intentioned [and] thoughtful arguments against certification of the class and approval of this settlement,” with the “aim [of] ensur[ing] that the claims of retired players are not given up in exchange for anything less than a generous settlement agreement

negotiated by very able representatives.” *In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 447 (3d Cir. 2016) (“*NFL Concussion II*”). Throughout the litigation, the Faneca Objectors focused on a few key issues: the treatment of CTE, the treatment of NFL Europe, the 75% reductions, and the procedural hurdles impeding recovery under the settlement. Dkt. 7070-1 at 9-10. The Final Settlement contained at least some improvement in three of those four areas. Co-Lead Class Counsel’s assertion that the Faneca Objectors spent their time “losing,” Dkt. 7464 at 44, makes no sense. Indeed, the Faneca Objectors won for the class benefits that Class Counsel could not achieve.

Moreover, the Faneca Objectors held the settling parties to *their* burden. While Co-Lead Class Counsel may have preferred to have the Faneca Objectors simply accept their bald assertions about CTE, the class was entitled to have that issue evaluated by the Court based on all the evidence and the views of all the experts – not just those selected by Co-Lead Class Counsel and the NFL. *See, e.g., In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 743-44 (3d Cir. 2001) (noting objector can make “substantial” contribution “by providing an adversarial context in which the district court could evaluate . . . fairness”).<sup>15</sup> Indeed, both the Third Circuit and this Court devoted substantial portions of their decisions to arguments raised by the Faneca Objectors. *NFL Concussion II*, 821 F.3d at 428-33; *NFL Concussion I*, 307 F.R.D. at 374, 376-

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<sup>15</sup> *See also UFCW Local 880–Retail Food Emp’rs Joint Pension Fund v. Newmont Mining Corp.*, 352 F. App’x 232, 236 (10th Cir. 2009) (noting objectors add value through “transforming the fairness hearing into a truly adversarial proceeding” or “supplying the Court with both precedent and argument to gauge the reasonableness of the settlement”); *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225, 1227 (8th Cir. 1982) (similar); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 367-68 (E.D.N.Y. 2010) (awarding fees although objector did not change terms of settlement); *Park*, 633 F. Supp. 2d at 11 (awarding fees despite inviting settlement amendments on own initiative); *In re Visa Check/MasterMoney Antitrust Litiig.*, No. CV-96-5238, 2005 WL 2077286, at \*11 n.5 (E.D.N.Y. Aug. 25, 2005) (noting courts have granted objector fee requests despite overruling objections); *Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 353-54 (S.D.N.Y. 2005) (awarding objector fees despite unsuccessful objections); *Newberg on Class Actions* § 15.60 (5th ed. 2016).

79, 383-85, 388-95, 397-406, 408-09, 411-14, 419-20. Courts do not do that for frivolous or wasteful arguments.

***Second, Co-Lead Class Counsel are wrong on the law.*** Co-Lead Class Counsel contend that “objectors play a much more limited role in class action litigation than do class counsel” and thus the Court should not “award them fees for all of their work conducted in the course of the litigation.” Dkt. 7464 at 44. In fact, “objectors’ entitlement to a fee rests upon the same common fund principles as class counsel’s, and hence there is no reason ‘to create a distinction between class and objector’s counsel on fee calculation.’” *Newberg on Class Actions* § 15.94 (5th ed. 2016) (quoting *Rodriguez v. W. Publ’g Corp.*, 602 F. App’x 385, 386 n.1 (9th Cir. 2015)). In a case like this, where almost the entire proceeding revolved around the settlement, objectors and class counsel are on nearly equal footing in terms of their participation in the case and the role that each played.

Co-Lead Class Counsel are also wrong to assert that objectors’ fees must be discounted for arguments that ultimately are unsuccessful. “Lawsuits usually involve many reasonably disputed issues and a lawyer who takes on only those battles he is certain of winning probably is not serving his clients vigorously enough; losing is part of winning.” *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991) (declining to “scalpel out attorney’s fees” for unsuccessful arguments). A party that “won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised.” *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). Indeed, the Supreme Court has cautioned district courts not “to apportion the fee award mechanically on the basis of [the party’s] success or failure on particular issues.” *Id.* at 438. Thus, “[w]here a [litigant] has obtained excellent results” – as the Faneca Objectors have – “his attorney should recover a fully compensatory fee.” *Id.* at 435.

Nothing in the cases cited by Co-Lead Class Counsel suggests otherwise. Those cases mainly stand for the unremarkable proposition that awarding objectors' fees using a lodestar approach (without a multiplier) is appropriate where the objector achieved no measurable improvement in settlement value.<sup>16</sup> Other cases cited by Co-Lead Class Counsel reduced fees where an objector's arguments were duplicative, where the objector's total investment was vastly disproportionate to the requested fee, or where the objector engaged in vexatious litigation conduct.<sup>17</sup> None of those concerns are present here.

### **B. The Faneca Objectors' Lodestar Multiplier Is Reasonable**

Co-Lead Class Counsel complain that the Faneca Objectors seek "more favorable" treatment than Class Counsel. That is not true. The Faneca Objectors' proposal would leave more than 82% of the Attorney's Fees Qualified Settlement Fund for Class Counsel. While Class Counsel deserve – and likely will receive – a large reward for their efforts in this case, their attempt to characterize this as a typical case where an objector shows up at the eleventh hour

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<sup>16</sup> See *Spark v. MBNA Corp.*, 289 F. Supp. 2d 510, 513 (D. Del. 2003) (denying fees where objector achieved no improvement in settlement value and did no more than cite a single relevant case); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 359 (N.D. Ga. 1993) (awarding objectors almost 5% of class counsel's fees "even though their objections did not prevail"); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d at 367-68 (awarding objector half his lodestar when efforts merely "served to clarify the proposed Settlement"); *Parker v. Time Warner Entm't Co.*, 631 F. Supp. 2d 242, 278 (E.D.N.Y. 2009) (applying lodestar method where objectors' estimate of settlement improvement was vastly higher than the court's estimate of total settlement value); *Lobur v. Parker*, 378 F. App'x 63, 65 (2d Cir. 2010) (affirming use of lodestar method where "objections arguably resulted in no increase in the class settlement's value").

<sup>17</sup> See *In re Riverstone Networks, Inc.*, 256 F. App'x 168, 170 (9th Cir. 2007) (using lodestar method where "objections [were] similar to those already raised by another objector"); *Sobel v. Hertz Corp.*, 53 F. Supp. 3d 1319, 1333 (D. Nev. 2014) (applying lodestar method where objector's "investment was minimal in relation to the award"); *Mirfasihi v. Fleet Mortg. Corp.*, No. 01-cv-722, 2007 WL 2608778, at \*7 (N.D. Ill. Sept. 6, 2007) (reducing objector's fee by half for vexatious litigation conduct); *Azizian v. Federated Dep't Stores, Inc.*, No. C-03-3359 SBA, 2006 WL 4037549, at \*9 (N.D. Cal. Sept. 29, 2006) (recommending denial of fees where objectors "did not increase or protect the value of the settlement or otherwise substantially benefit the Class").

after substantial effort by class counsel, *see* Dkt. 7464 at 53-54, falls flat. Class Counsel request an award of the full \$112.5 million that the Final Settlement earmarks for attorneys' fees, plus 5% of the settlement awards of individual class members – ***without having taken any discovery***. There was limited motions practice, no contested class certification, no summary judgment practice, and no trial. The litigation was about whether the settlement was fair, reasonable, and adequate – pitting the Faneca Objectors against Co-Lead Class Counsel and the NFL.

Co-Lead Class Counsel spent over half of their five-year involvement in this case litigating the fairness of the settlement against the Faneca Objectors. Dkt. 7151-2 ¶¶ 53-62. The Faneca Objectors stood toe-to-toe with Co-Lead Class Counsel – and the NFL. Under those circumstances, it is reasonable to allocate a substantial portion of the attorneys' fees to the Faneca Objectors, who successfully fought for more than two years to extract more than \$100 million more from the NFL.

Co-Lead Class Counsel's authorities only prove that the Faneca Objectors' participation cannot be compared to that of objectors in typical cases. Co-Lead Class Counsel cite two cases where objectors invested under 100 hours complaining of the allocation of attorneys' fees or a reversion provision in the settlement. *See Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 815-16 (N.D. Ohio 2010); *Park v. Thomson Corp.*, 633 F. Supp. 2d 8, 13 (S.D.N.Y. 2009). Those cases say nothing about the appropriate objector fees in a case where the objector vigorously litigated the substance of the settlement with the parties, and obtained major improvements as a result.

Co-Lead Class Counsel's complaint that the Faneca Objectors' proposed fee award would result in a higher multiplier for the Faneca Objectors than for Class Counsel likewise

fails.<sup>18</sup> First, the Faneca Objectors bore far more risk than Class Counsel, making a higher multiplier appropriate. The NFL agreed to settle quite early in this case, and thereafter Class Counsel faced relatively little risk of nonpayment. The Faneca Objectors, meanwhile, were faced with trying to secure further improvements to a settlement that was the product of two months of intense negotiations, and which had already been improved once as a result of this Court's actions.

Second, Class Counsel's asserted lodestar is inordinately large. Class Counsel billed 50,962.39 hours, which they value at \$40,586,228.60. Dkt. 7464-1 ¶2; Dkt. 7464-2 ¶6. They do not break up that lodestar by task, as the Faneca Objectors did, making it impossible to assess the efficiency of their efforts. However, assuming that Class Counsel spent approximately as much time defending the settlement as the Faneca Objectors spent testing it – a reasonable assumption given the comparable scope and quality of the parties' filings in this case – that leaves over **\$36 million** of professional time spent on: pre-suit investigation, preparation of the long-form, short-form, and class-action complaints, briefing and argument of the limited motion to dismiss, settlement negotiations, and preparation of the notice. *Id.* ¶¶12-52. That is not reasonable. It results in an artificially high lodestar and an artificially low lodestar multiplier.

Moreover, twenty-four law firms or individual lawyers are included in Class Counsel's fee petition, but the negotiating team apparently consisted of just six individuals and their firms: Mr. Seeger, Mr. Weiss, Mr. Levin, Ms. Nast, Mr. Locks, and Mr. Marks. Dkt. 7151-2 ¶25. Of those, Mr. Levin and Ms. Nast joined in the negotiations late in the game.<sup>19</sup> Excluding those

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<sup>18</sup> Co-Lead Class Counsel do not dispute that the multiplier sought by the Faneca Objectors falls within the range considered reasonable by this and other courts. Dkt. 7070-1 at 47-48.

<sup>19</sup> Negotiations began in January 2013, Dkt. 7151-2 ¶24, but Mr. Levin was not recruited as Subclass 1 Counsel until July 2013, Dkt. 7151-6 ¶2f. Ms. Nast, meanwhile, first met with Mr. Turner about representing Subclass 2 in August 2013. Dkt. 7151-2 ¶129.

attorneys' firms and appellate counsel, Mr. Issacharoff, the remaining attorneys billed almost **\$9 million** – over twice the Faneca Objectors' lodestar – despite the early resolution of this case. For example, Mr. Gibbs's firm billed approximately \$280,000 for activities such as drafting portions of the motion for final approval, preparing for and attending the fairness hearing, and drafting portions of the appellate brief. Dkt. 7151-15 ¶¶2, 5. Mr. Girardi's firm billed approximately \$472,000 for unspecified efforts that were "critical to the investigation of groundbreaking facts, creation of liability against the [NFL] and litigating the case up to and including the arguments on the NFL's Motions to Dismiss." Dkt. 7151-16 ¶2. All of these efforts may be justifiable standing alone. But Class Counsel cannot accuse the Faneca Objectors of litigating this case inefficiently where their own petition provides little detail and raises substantial concerns about duplication of effort or unnecessary work.

Moreover, Class Counsel have not identified which of the firms seeking fees will also be paid through contingency fee contracts that will allow them to capture part of any award their clients receive. Counsel for the Faneca Objectors have no such "double dipping arrangements."<sup>20</sup>

#### **IV. The Faneca Objectors' Response to the Jones Objectors' Fee Petition and the Objection of Curtis Anderson**

The Faneca Objectors take no position on whether the Jones Objectors are entitled to a fee award for their objection to the Revised Settlement's treatment of NFL Europe. *See* Dkt. 7364-1 at 10-11. The Faneca Objectors note, however, that they identified and raised the settlement's unfair treatment of NFL Europe before any other objector, and did so more fully and in greater detail. The Faneca Objectors' July 2, 2014 opposition to Co-Lead Class Counsel's

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<sup>20</sup> For example, counsel for the estate of Kevin Turner may receive up to 45% of any recovery, Dkt. 7029 ¶6, on top of the fees they seek from the attorneys' fees fund, Dkt. 7151-8.



motion for preliminary approval explained that “the Revised Settlement, while releasing all claims of NFL Europe players, does not award class members ‘Eligible Season’ credit for time spent playing in NFL Europe or its predecessors.” Dkt. 6082 at 28. Their October 6, 2014 objection expanded on that point. Dkt. 6201 at 34-36; *see also* Dkt. 7070-1 at 10, 14, 16. Importantly, unlike most other objectors, the Faneca Objectors submitted evidence describing the conditions in NFL Europe and the severity of injury that NFL Europe players sustained. *See* Dkts. 6201-6 Ex. 25, 6201-7 Ex. 26, 6201-17. Others who objected to treatment of NFL Europe simply echoed those arguments. Indeed, some – including the Jones Objectors – expressly joined in the Faneca Objectors’ submission. *See* Dkt. 6235 at 2 (“The Jones Objectors share the objections to Class Action Settlement of Sean Morey *et al.*, filed October 6, 2014.”); Dkt. 6237 at 2.

For his part, Objector Anderson expressly opposes the Faneca Objectors’ fee request, arguing that “any quantification of the benefits produced by the enhancement must await the actual filing, evaluation, and payment of claims.” *See* Dkt. 7370 at 4.<sup>21</sup> But as the Faneca Objectors explained, class members’ “right to share the harvest of the lawsuit . . . , whether or not they exercise it, is a benefit in the fund created by the efforts of” objectors’ counsel. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980); *see also* Dkt. 7366 at 10-16. Thus, contrary to Objector Anderson’s suggestion, it is the “maximum possible benefits” available for the class to claim that matters for purposes of determining a fee award. *See, e.g., Gascho v. Glob. Fitness*

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<sup>21</sup> Elsewhere, Objector Anderson argues that basing attorneys’ fees “‘on the entire settlement amount . . . creates a potential conflict of interest between absent class members and their counsel.’” Dkt. 7370 at 1 (quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013)). That concern justifies a reduced settlement valuation only where “counsel has not [sought] an award that adequately prioritizes direct benefit to the class.” *Baby Prods.*, 708 F.3d at 178. It does not apply to objectors’ counsel, who throughout the proceedings maintain an adversarial relationship with both class counsel and defendants. *See* Dkt. 7366 at 11 n.12.



*Holdings, LLC*, 822 F.3d 269, 282-88 (6th Cir. 2016); Dkt. 7366 at 10-16. That is the value that resulted from the Faneca Objectors' efforts. That is the value on which attorneys' fees should be based.

### **CONCLUSION**

For those reasons, the Court should grant the Faneca Objectors' Petition for an Award of Attorneys' Fees and Expenses.

Dated: April 25, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2017, I caused the foregoing Faneca Objectors' Reply in Support of Their Petition for an Award of Attorneys' Fees and Expenses to be filed with the United States District Court for the Eastern District of Pennsylvania via the Court's CM/ECF system, which will provide electronic notice to all counsel and parties.

/s/ Steven F. Molo

# Exhibit A

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB  
MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Civil Action No. 2:14-cv-00029-AB

Plaintiffs,

V.

National Football League and  
NFL Properties, LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

## REBUTTAL EXPERT DECLARATION OF

**Joseph J. Floyd**

**April 25, 2017**

FLOYD ADVISORY LLC  
155 FEDERAL ST, 14<sup>TH</sup> FLOOR  
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JA7777

# TABLE OF CONTENTS

|             |                                                                  |          |
|-------------|------------------------------------------------------------------|----------|
| <b>I.</b>   | <b>INTRODUCTION.....</b>                                         | <b>1</b> |
| <b>II.</b>  | <b>EXPERT QUALIFICATIONS .....</b>                               | <b>1</b> |
| <b>III.</b> | <b>ANALYSIS OF THE VASQUEZ REPORT .....</b>                      | <b>2</b> |
|             | <b>A. Effect of Increased Participation Rates .....</b>          | <b>2</b> |
|             | <b>B. Uncapping the BAP Fund .....</b>                           | <b>3</b> |
|             | <b>C. NFL Europe Eligible-Season Credit .....</b>                | <b>3</b> |
|             | <b>D. Expanded Qualifying Diagnosis for Death with CTE .....</b> | <b>3</b> |
|             | <b>E. Elimination of Appeal Fee .....</b>                        | <b>4</b> |

I, Joseph J. Floyd, declare as follows pursuant to 28 U.S.C. § 1746:

## **I. INTRODUCTION**

I have been engaged by MoloLamken LLP (“Objectors’ Counsel”) as an accounting and finance expert. In that capacity, I have assessed the reasonableness of MoloLamken LLP’s estimated value of the improvements to the June 25, 2014 Settlement Terms (“Added Value of Improvements”). I have also conducted independent valuation analyses to test the assumptions and judgments made by MoloLamken LLP.

On March 27, 2017, I submitted the Expert Declaration of Joseph J. Floyd (“Floyd March 27 Report”). I have been asked by Objectors’ Counsel to evaluate and respond to certain analyses and opinions contained in the April 10, 2017 Updated Analysis of the NFL Concussion Settlement prepared by Thomas Vasquez, Ph.D. (“Vasquez Report”).<sup>1</sup>

## **II. EXPERT QUALIFICATIONS**

Class Counsel has described their reliance on the Vasquez Report as follows: “In this respect, Class Counsel rely on the accompanying valuation performed by Dr. Vasquez, an economist with longstanding expertise in this field who has engaged in developing economic models for U.S. and foreign governments, and who has been consulted in numerous litigations and whose Declaration accompanies this memorandum. Earlier, Dr. Vasquez had prepared a valuation of the Settlement that Class Counsel filed with the Court in support of Final Approval. See ECF No. 6423-21. By contrast, the valuation that the Faneca Objectors have submitted is from a CPA having no demonstrable experience in the specific realm of settlement valuations. See ECF No. 7366, at 5-6.”<sup>2</sup>

Settlement valuations are analogous to damage calculation analyses. As stated in the Floyd March 27 Report, “[d]uring my approximately thirty-four-year career in the accounting and consulting profession, I have worked on numerous financial analysis engagements, valuation assignments, financial reporting projects, and other similar assignments, including intellectual property valuations and damages calculations.”<sup>3</sup> A settlement valuation analysis is performed in the same way as a damage calculation: quantifying the harm, and probability of occurrence to determine the value attributable to the settlement terms. The methodology and estimates used need to be analyzed and evaluated in the same way to ensure the analyses are reasonable and appropriate. Therefore, my experience in damage calculation analyses qualifies me to opine on the value of the settlement in this case.

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<sup>1</sup> This report is limited to my opinions set forth herein and was not intended to address every analysis or opinion presented in the Vasquez Report. Therefore, the lack of discussion in this report related to specific analyses and opinions set forth in the Vasquez Report does not constitute my agreement with such analysis or opinion.

<sup>2</sup> ECF No. 7464 at pg. 43, FN 36.

<sup>3</sup> Floyd March 27 Report at pg. 2.

### III. ANALYSIS OF THE VASQUEZ REPORT

### A. Effect of Increased Participation Rates

According to the Vasquez Report, the increase in participation rates estimated in 2014, due to the trend in the registration patterns in the first eight weeks, results in added value of approximately \$41.1 million to the Monetary Award Fund (“MAF”).<sup>4</sup>

The Vasquez Report's updated participation rate calculation impacts my Floyd March 27 Report calculation for any added value items which use an estimate based on an average from the November 2014 Vasquez Declaration, attached as an exhibit in the Vasquez Report. The added value items that rely on such estimates are the Elimination of Appeal Fee and the NFL Europe Eligible-Season Credit. The increase in the participation rate has a relative value increase for each average. In other words, as more people will participate, the respective averages will increase, leading to a total increase of \$2.2 million. With this update, the total added value of improvements from my Independent Valuation Assessment increases to \$122.6 million, calculated by taking the added value from the Floyd March 27 Report of \$120.4 million<sup>5</sup> and adding the increase of \$2.2 million.

The increase attributable to the Elimination of Appeal Fee is \$0.7 million, calculated by increasing the average amount funded per eligible player of \$187,709<sup>6</sup> by the relative increase in the participation rate from 59.3% to 63%.<sup>7</sup> The increase in the participation rate yields an increase in the average to \$199,421. The new average is then used against the estimated 58 deterred players<sup>8</sup> to calculate the new added value of improvements of \$11.6 million. The new added value is compared to the added value calculated in the Floyd March 27 Report of \$10.9 million<sup>9</sup> to calculate the increase of \$0.7 million.

The increase attributable to the NFL Europe Eligible-Season Credit is \$1.5 million, calculated by increasing the average eligible class member funded per season of \$11,185<sup>10</sup> by the relative increase in the participation rate from 59.3% to 63%.<sup>11</sup> The increase in the participation rate yields an increase in the average to \$11,883. The new average is then used against the additional 2,143 eligible seasons<sup>12</sup> to calculate the new added value of improvements of \$23.6 million, after adjusting for the estimated amount funded of

<sup>4</sup> Vasquez Report at pg. 3, Table 1, and pg. 6.

<sup>5</sup> Floyd March 27 Report at pg. 3

<sup>6</sup> Floyd March 27 Report at Exhibit C.

<sup>7</sup> Vasquez Report at pg. 5.

<sup>8</sup> Floyd March 27 Report at Exhibit C.

<sup>9</sup> Floyd March 27 Report at Exhibit C.

<sup>10</sup> Floyd March 27 Report at Exhibit C.

<sup>11</sup> Vasquez Report at pg. 5.

<sup>12</sup> Floyd March 27 Report at Exhibit C.

NFL Europe only players at zero eligible season of \$1.8 million.<sup>13</sup> The new added value is compared to the added value calculated in the Floyd March 27 Report of \$22.1 million<sup>14</sup> to calculate the increase of \$1.5 million.

### **B. Uncapping the BAP Fund**

The Vasquez Report states that “[t]he increase in participation rates and the eligibility of European players is expected to increase the number of baseline exams, and their attendant costs. However, any such increased cost is still well-within the \$75 million provisioned in the BAP Program for such exams.”<sup>15</sup>

The Vasquez Report does not attempt to quantify the incremental value created. As described in the Floyd March 27 Report, “[i]n this section, as described above, I have calculated the maximum possible estimated pay out of Supplemental Benefits. I have not considered the \$75 million cap, which depending on the Court’s actions may still be applicable to the Supplemental Benefits. Further, a major variable in assessing the Value Added of Improvements if a cap on Supplemental Benefits remains will be the timing of when exam costs are used as they may absorb a large percentage of the cap.”<sup>16</sup>

### **C. NFL Europe Eligible-Season Credit**

The Vasquez Report calculates added value of approximately \$30 million resulting from the eligibility of NFL Europe seasons. According to the Vasquez Report, “[t]he calculation of additional MAF payments was made by adding the additional seasons to each affected player and recalculating the MAF award. This was done for each affected player and added to a total across all affected players.”<sup>17</sup>

The calculation referenced in the Vasquez Report uses a life cycle forecasting model.<sup>18</sup> As discussed in the Floyd March 27 Report, I do not have access to this model as it was not provided to me, nor does it appear to be an easily replicated model. In assessing the calculation in my Floyd March 27 Report, I evaluated the inputs and assumptions that are used in the model to assess the reasonableness of applying an average value from that calculation.

### **D. Expanded Qualifying Diagnosis for Death with CTE**

The Vasquez Report states that “[i]t is difficult to precisely estimate the additional payments to players who died and were diagnosed post-mortem with CTE during this period of time. Indeed, the authors of available

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<sup>13</sup> Floyd March 27 Report at Exhibit C.

<sup>14</sup> Floyd March 27 Report at Exhibit C.

<sup>15</sup> Vasquez Report at pg. 8.

<sup>16</sup> Floyd March 27 Report at pg. 7, FN 16.

<sup>17</sup> Vasquez Report at pg. 7.

<sup>18</sup> Vasquez Report at pg. 4.



studies of former players concerning CTE admit bias in the cases examined (only players with observed symptoms were studied). However, the reports of post-mortem pathological diagnoses of CTE in former players in recent years provide relevant data for the purpose of approximating potential additional claims. Among the 424 former players who died between 2010 and 2012, 32 or 7.55% reportedly had post-mortem pathological diagnoses characteristic of CTE.”<sup>19</sup>

An appropriate method for estimating the number of former NFL players who will be diagnosed with CTE upon death would be based on analyzing all deceased NFL players. The majority of players who have died were not tested for CTE, so this method is not an option. I used the number of NFL players found to have CTE as a percentage of all players who have been tested for CTE, whereas the Vasquez Report appears to use the number of NFL players found to have CTE as a percentage of all deceased NFL players. The flaw in the Vasquez Report’s approach lies in the fact that the majority of former NFL players who died were never tested for CTE. The Vasquez Report’s estimate thus assumes that all former NFL players who have died and have not been tested for CTE do not have CTE. The only possible bias in my estimate is that the population of players tested for CTE may have had greater concerns of CTE than the population of untested players. I have not seen any evidence that this is true and, therefore, deem my approach reasonable.

#### **E. Elimination of Appeal Fee**

Per the Vasquez Report, Dr. Vasquez asserts that he is “not able to value the last two changes to the Settlement, because attempting to value those changes, namely, providing a waiver of the \$1,000 appeal fee for Class Members demonstrating financial hardship and allowing a reasonable accommodation for Class Members who do not possess medical records in support of a Qualifying Diagnosis due to force majeure type events, would be speculative.”<sup>20</sup>

The Vasquez Report does not refute that a benefit exists by the waiver of the fee, and has chosen not to comment upon my analysis. Rather, the Vasquez Report simply does not offer any opinion as to the value of the waiver of the fee.

Restatement (Second) of Contracts § 352 (1981) states: “Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”<sup>21</sup> This statement addresses the notion that reasonable certainty must be proven based on the permitted evidence. Per Restatement (Second) of Contracts § 352 (1981), the reasonable certainty standard does not require an exact calculation, but rather an estimate. By analogy, valuing the benefits of a settlement requires no more than reasonable certainty.

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<sup>19</sup> Vasquez Report at pg. 8.

<sup>20</sup> Vasquez Report at pg. 2, FN 3

<sup>21</sup> Restatement (Second) of Contracts § 352 (1981)

As described in the Floyd March 27 Report, “I calculated the size of this population relative to the entire Eligible Class Members with a Qualifying Diagnosis. The 58 Eligible Class Members represent less than one quarter of one percent, a relatively de minimis amount. In assessing the reasonableness of this conclusion, I rely on accepted behavioral science theories, notably the loss aversion (prospect theory) and rational choice.”<sup>22</sup> Importantly, loss aversion means that people make decisions that value losses far greater than gains. In this case, losing \$1,000 can be a deterrent for many in the rejected population. In addition, rational choice means that with nothing to lose, and knowledge of potential upside, the rejected players would be motivated to appeal due to the waiver of the appeal fee if they are in financial stress. Based on the nominal amount of players estimated in the additional population, and these behavioral science theories, the amount calculated by Objectors’ Counsel appears reasonable and conservative as a valuation estimate.”<sup>23</sup>

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<sup>22</sup> Encyclopedia Britannica, “Prospect Theory,” <https://www.britannica.com/topic/prospect-theory>.

Encyclopedia Britannica, “Rational Choice Theory,” <https://www.britannica.com/topic/rational-choice-theory>.

<sup>23</sup> Floyd March 27 Report at pgs. 11-12.

\*\*\*\*\*

I reserve the right to supplement or amend this declaration as additional relevant information becomes available and to address issues raised by other witnesses.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 2017 in Boston, MA.

A handwritten signature in cursive script, reading "Joseph J. Floyd". The signature is written in dark ink and is positioned above a horizontal line.

---

Joseph J. Floyd

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

Kevin Turner and Shawn Wooden, *on behalf  
of themselves and others similarly situated,*

Plaintiffs,

v.

National Football League and NFL  
Properties LLC, successor-in-interest to NFL  
Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Civ. Action No. 14-00029-AB

**REPLY IN SUPPORT OF PETITION OF OBJECTORS PRESTON AND  
KATHERINE JONES FOR AWARD OF ATTORNEYS' FEES FOR  
SUCCESSFUL EFFORTS TO IMPROVE THE SETTLEMENT FOR  
NFL EUROPE LEAGUE PLAYERS (ECF # 7364)**

Co-Lead Class Counsel's Omnibus Reply Memorandum in Further Support of Petition for Award of Attorneys' Fees etc. ("Omnibus Reply")<sup>1</sup> erroneously lumps in the Jones Objectors with so-called "losing objectors" (page 36) who "unsuccessfully battled the Settlement" (page 1) and tried to "scuttle the Settlement" (pages 3, 36). The Jones Objectors did not oppose the final

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<sup>1</sup> ECF No. 7464. The Omnibus Reply is in part a reply to several oppositions filed against Class Counsel's Petition for Award of Attorneys' Fees and Reimbursement of Expenses, and in remaining part an opposition to three objector petitions for attorneys' fees, including that of the Jones Objectors (ECF No. 7364). Page references herein are to the pagination of the original document, rather than the ECF numbering.

Settlement and were successful in their objection efforts, as measured by benefits accruing to the Class.<sup>2</sup>

Class Counsel's Omnibus Reply is totally silent on the point that a portion of the fees Class Counsel is seeking is based on substantial NFL Europe-league playing-season benefits eligibility that Class Counsel not only did not achieve, but actually worked (and billed time) to oppose. Class Counsel's argument that objectors are collectively "outlandish" and "asking to be paid for acting *to the detriment of the Class*" (Omnibus Reply at p. 36) completely flips reality in the context of the benefits for Europe-league retired players. In that arena, it was not objectors who "lost" (*id.*); objectors succeeded, and the Class substantially benefitted as the result. Class Counsel's own logic *directly supports* a fee award to objector counsel rather than to Class Counsel for the Settlement's Europe-league benefits. This logic applies to any basic award from the Attorneys' Fees Qualified Settlement Fund, as well as the so-called five-percent "set-aside" Class Counsel has requested.<sup>3</sup>

Further, as Class Counsel also argues, "'the court can easily evaluate not only the quality of the objector's work but also the impact it had on the court's ultimate decision,' and it is thus 'able to measure the dollar value of the objector's contribution to the class's net recovery.'" ECF No. 7464, Omnibus Reply at pages 37-38 (quoting *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 201 n.17 (3d Cir. 2005)). The Jones Objectors' fee petition (ECF No. 7364) attempted to present

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<sup>2</sup> In addition to arguing for NFL Europe league playing season credit, the Jones Objectors also concurred in the Faneca Objectors' objection to the July 7, 2014 termination of eligibility for benefits payable to survivors of retired players who died with CTE after preliminary settlement approval. Even that additional objection achieved some success inasmuch as the Court's February 2, 2015 Order instructed that such survivor benefits be extended through the date of final approval of the Settlement. The Jones Objectors seek no fees based on that interim enhancement.

<sup>3</sup> The logical point is unaffected by Class Counsel's perplexing assertion (Omnibus Reply at pp. 22-23) that its requested additional set-aside of five percent of monetary awards to claimants will be paid or reimbursed by individual claimants' *counsel* (at least for those claimants who have counsel at the time), rather than be diverted from benefits otherwise payable to claimants (which is what the Settlement Agreement actually provides), even if the assertion were assumed to be correct. But the assertion in fact appears as simply a wishful suggestion by Class Counsel, reflected in a purported "example" in Section 21.1 of the Agreement. Neither current nor currently unknown potential future individual claimant counsel were even parties to the Settlement Agreement, which in any event makes no attempt at any provision or mechanism to reduce the impact of the set-aside on a claimant who has retained or will retain counsel.

all the potentially relevant papers to the Court on the Europe season credit enhancement, on the expectation that this might assist the Court in doing exactly that.

Class Counsel at times seems to suggest that any objectors who were not "first" to file their brief must not have assisted the Court or helped the Class, noting that the Faneca Objectors (who pressed objections on multiple grounds during the settlement approval process) filed their objections to the June 25, 2014 proposed settlement eight days before other objectors, on October 6, 2014 (ECF No. 7464, Omnibus Reply at p. 64 n.61). Of course, that was also exactly eight days before the October 14, 2014 deadline for objections set by the Court's July 7, 2014 preliminary approval Order (ECF No. 6084), so the sequence of briefs was made virtually inevitable, and may reflect a preference by the Faneca Objectors to be "first," as they were again with their attorneys' fee petition to this Court (ECF No. 7070). In all events, in exercise of its "broad discretion" on objector fees (Omnibus Reply at p. 37), the Court may certainly include consideration of whether the order of the briefs affected their usefulness to the Court in any respect.

Finally, Class Counsel curiously describes the Jones Objectors as "minor objectors" (ECF No. 7464, Omnibus Reply at p. 63). This may have been intended to diminish their arguments without fully engaging them. But the Jones Objectors' central concern was with the treatment of NFL Europe league players in the June 25, 2014 proposed settlement, because like many retired players, Preston Jones played most of his NFL career in Europe. On that issue, the Jones Objectors were no more "minor" than any other objector or objector group; the voluminous and wide-ranging briefs, expert declarations, and appeals that might render certain other objectors as comparatively "major" litigation players are not logically relevant to the Court's evaluation of common benefit counsel fees specifically for benefits achieved for Europe-league retired players and their families. Again, it falls to the Court to assess the usefulness to the Court of the Europe-league season credit objections leading to the Court's February 2, 2015 Order (ECF No. 6479) declining to approve the June 25, 2014 proposed settlement on enumerated grounds, which accordingly gave rise eleven days later (ECF No. 6481-1) to what would become the final improved Settlement (see ECF No. 6509 at p. 4 & n. 1).

On the expectation that the Court will agree with Class Counsel that "losing" arguments and indeed arguments advanced to the detriment of the ultimate interests of the Class do *not* generally merit common benefit compensation, while successful efforts that demonstrably and substantially benefit the Class *do*, the Jones Objectors respectfully request that the Court consider their petition for a discretionary award of fees for the substantial European-league season credit enhancement to the Settlement.

Dated: April 25, 2017

Respectfully submitted,

*/s/ James T. Capretz*

---

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on April 26, 2017.

/s/ James T. Capretz

James T. Capretz



**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*  
  
Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,  
  
Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Civ. Action No. 14-00029-AB

**CO-LEAD CLASS COUNSEL'S MOTION TO STRIKE OR DISREGARD  
ALEXANDER OBJECTORS' UNAUTHORIZED SUR-REPLY  
"RESPONSE AND OBJECTION" TO FEE PETITION REPLY PAPERS  
OR, ALTERNATIVELY, TO ACCEPT CLASS COUNSEL'S SUR-SURREPLY**

Co-Lead Class Counsel respectfully move to have the Court strike from the record or to disregard the Alexander Objectors' April 21, 2017 "Response and Objection to Supplemental Evidence Offered in Co-Lead Class Counsel's Omnibus Reply in Opposition to Co-Lead Class Counsel's Petition for an Award of Attorneys' Fees Reimbursement of Costs and Expenses, Adoption of a Set-Aside of Each Monetary Award Derivative Claimant Award, and Case Contribution Awards for Class Representatives" (ECF No. 7533), including the accompanying Declaration of Jamshid Lotfi, M.D., FRCP (London) (ECF No. 7533-1) (collectively, the

“Response and Objection Sur-Reply”). The Response and Objection Sur-Reply was filed, without prior leave of this Court, eleven days after the close of briefing (in accordance with the schedule set forth in the Court’s March 8, 2017 Order [ECF No. 7261]) on Co-Lead Class Counsel’s petition for an award of fees and reimbursement of expenses (ECF No. 7151) (“Fee Petition”).

In the alternative, Co-Lead Class Counsel respectfully request that the Court accept, as Class Counsel’s sur-surreply, the substantive response to the unauthorized Response and Objection Sur-Reply that is set forth in Section II.B of the accompanying memorandum of law) in order to cure the prejudice that would otherwise result from the Alexander Objectors slipping in the last word on the Fee Petition.

The reasons supporting the instant motion are more fully set forth in the accompanying memorandum of law. A proposed Order is submitted herewith.

Dated: May 5, 2017

Respectfully submitted,

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***Co-Lead Class Counsel***

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on May 5, 2017.

/s/ Christopher A. Seeger  
Christopher A. Seeger

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Civ. Action No. 14-00029-AB

Plaintiffs,

V.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**CO-LEAD CLASS COUNSEL’S CONSOLIDATED MEMORANDUM (1) IN SUPPORT  
OF THEIR MOTION TO STRIKE OR DISREGARD THE ALEXANDER OBJECTORS’  
UNAUTHORIZED SUR-REPLY OR, IN THE ALTERNATIVE, TO ACCEPT CLASS  
COUNSEL’S SUR-SURREPLY; AND (2) IN OPPOSITION TO THE ALEXANDER  
OBJECTORS’ MOTION FOR LEAVE TO SERVE DISCOVERY**

## **TABLE OF CONTENTS**

|                                                                                                                                                                                                                                                           |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| I. INTRODUCTION .....                                                                                                                                                                                                                                     | 1  |
| II. THE COURT SHOULD EITHER STRIKE OR DECLINE TO CONSIDER THE<br>ALEXANDER OBJECTORS’ UNAUTHORIZED “RESPONSE AND OBJECTION” .....                                                                                                                         | 3  |
| A. The “Response and Objection” Is an Unauthorized Sur-Reply .....                                                                                                                                                                                        | 3  |
| B. In the Alternative, the Court Should Accept Class Counsel’s Substantive<br>Response to the Alexander Objectors’ Latest Arguments So That Class<br>Counsel Are Not Prejudiced by the Alexander Objectors’ Having the Last<br>Word on the Petition ..... | 8  |
| 1. Class Plaintiffs’ Expert’s Valuation of the Settlement Is Based Upon Sound<br>Actuarial Principles and Underlying Facts That This Court Previously Found .....                                                                                         | 8  |
| 2. Court-Appointed Lead Class Counsel Typically Make Allocations Among<br>Those Firms That Performed Common Benefit Work .....                                                                                                                            | 12 |
| III. THE COURT SHOULD REJECT THE ALEXANDER OBJECTORS’<br>ELEVENTH-HOUR BID FOR FEE PETITION-RELATED DISCOVERY .....                                                                                                                                       | 15 |
| IV. CONCLUSION.....                                                                                                                                                                                                                                       | 20 |

## TABLE OF AUTHORITIES

### Cases

|                                                                                                                                                                                                                                                |        |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>16 Front St. LLC v. Miss. Silicon, LLC</i> ,<br>162 F. Supp. 3d 558 (N.D. Miss. 2016).....                                                                                                                                                  | 7      |
| <i>Adams v. U.S. EEOC</i> ,<br>932 F. Supp. 660 (E.D. Pa. 1996) .....                                                                                                                                                                          | 4      |
| <i>Avaya, Inc. v. Telecom Labs, Inc.</i> ,<br>No. 06-2490, 2016 WL 223696 (D.N.J. Jan. 19, 2016).....                                                                                                                                          | 15, 16 |
| <i>Charlton v. Werfel</i> ,<br>No. 2:13-05236 WJM, 2014 WL 2765718 (D.N.J. June 18, 2014).....                                                                                                                                                 | 5      |
| <i>EMC Corp. v. Pure Storage, Inc.</i> ,<br>154 F. Supp. 3d 81 (D. Del. 2016).....                                                                                                                                                             | 5      |
| <i>Fulk v. Norfolk S. Ry. Co.</i> ,<br>35 F. Supp. 3d 749 (M.D.N.C. 2014) .....                                                                                                                                                                | 7      |
| <i>Garcia v. Biter</i> ,<br>195 F. Supp. 3d 1131 (E.D. Cal. 2016).....                                                                                                                                                                         | 5      |
| <i>Glass v. Lahood</i> ,<br>786 F. Supp. 2d 189 (D.D.C. 2011), <i>aff'd</i> , No. 11-5144, 2011 WL 6759550<br>(D.C. Cir. Dec. 8, 2011).....                                                                                                    | 5      |
| <i>In re Capital One Tel. Consumer Prot. Act Litig.</i> ,<br>80 F. Supp. 3d 781 (N.D. Ill. 2015), <i>appeals dismissed</i> , Nos. 15-1514<br>(7th Cir. May 5, 2015), 15-1546 (June 8, 2015), 15-1400, 15-1586, 15-1639<br>(June 26, 2015)..... | 16     |
| <i>In re Diet Drugs Prods. Liab. Litig.</i> ,<br>MDL No. 1203, 2002 WL 32154197 (E.D. Pa. Oct. 3, 2002).....                                                                                                                                   | 13     |
| <i>In re Fine Host Corp. Secs. Litig.</i> ,<br>No. 3:97-CV-2619 JCH, 2000 WL 33116538 (D. Conn. Nov. 8, 2000).....                                                                                                                             | 19     |
| <i>In re Indigo Secs. Litig.</i> ,<br>995 F. Supp. 233 (D. Mass. 1998) .....                                                                                                                                                                   | 13     |
| <i>In re Jamuna Real Estate, LLC</i> ,<br>392 B.R. 149 (Bankr. E.D. Pa. 2008) .....                                                                                                                                                            | 9      |

|                                                                                                                                                  |              |
|--------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| <i>In re Linerboard Antitrust Litig.</i> ,<br>No. MDL 1261, 2004 WL 1221350 (E.D. Pa. June 2, 2004) .....                                        | 13           |
| <i>In re Linerboard Antitrust Litig.</i> ,<br>No. MDL 1261, 2010 WL 3928638 (E.D. Pa. Oct. 5, 2010).....                                         | 15           |
| <i>In re NFL Players Concussion Injury Litig.</i> ,<br>821 F.3d 410 (3d Cir. 2016).....                                                          | 12           |
| <i>In re NFL Players’ Concussion Injury Litig.</i> ,<br>307 F.R.D. 351 (E.D. Pa. 2015).....                                                      | 7, 9, 10, 12 |
| <i>In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions</i> ,<br>148 F.3d 283 (3d Cir. 1998).....                                   | 13           |
| <i>In re Safety Components, Inc. Sec. Litig.</i> ,<br>166 F. Supp. 2d 72 (D.N.J. 2001) .....                                                     | 18           |
| <i>In re Vitamin Cases</i> ,<br>No. 301803, 2004 WL 5137597 (Cal. Super. Ct. S.F. Cnty. Apr. 12, 2004).....                                      | 13           |
| <i>In re Vitamins Antitrust Litig.</i> ,<br>398 F. Supp. 2d 209 (D.D.C. 2005).....                                                               | 14           |
| <i>Jasper v. C.R. England, Inc.</i> ,<br>No. 08-5266-GW(CWX), 2014 WL 12577426 (C.D. Cal. Nov. 3, 2014) .....                                    | 18           |
| <i>KDH Elec. Sys., Inc. v. Curtis Tech. Ltd.</i> ,<br>826 F. Supp. 2d 782 (E.D. Pa. 2011).....                                                   | 9            |
| <i>Laborers’ Local Union Nos. 472 &amp; 172 v. Buckler Assocs.</i> ,<br>No. 12-7119, 2013 WL 353441 (D.N.J. Jan. 29, 2013).....                  | 5            |
| <i>Lacher v. West</i> ,<br>147 F. Supp. 2d 538 (N.D. Tex. 2001) .....                                                                            | 5            |
| <i>Liberty Legal Found. v. Nat’l Democratic Party of the USA, Inc.</i> ,<br>875 F. Supp. 2d 791 (W.D. Tenn. 2012).....                           | 5            |
| <i>Loudermilk Servs., Inc. v. Marathon Petroleum Co.</i> ,<br>623 F. Supp. 2d 713 (S.D.W. Va. 2009).....                                         | 18           |
| <i>Malchman v. Davis</i> ,<br>588 F. Supp. 1047 (S.D.N.Y. 1984), <i>aff’d as modified on other grounds</i> ,<br>761 F.2d 893 (2d Cir. 1985)..... | 17           |
| <i>Martucci v. Procter &amp; Gamble, Inc.</i> ,<br>No. 15-4434 (JLL), 2016 WL 1408277 (D.N.J. Apr. 11, 2016).....                                | 4            |

|                                                                                                                                                                                       |      |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| <i>Mattern v. City of Sea Isle</i> ,<br>131 F. Supp. 3d 305 (D.N.J. 2015), <i>aff'd</i> , 657 F. App'x 134 (3d Cir. 2016) .....                                                       | 4    |
| <i>Metz v. United Ctys. Bancorp</i> ,<br>61 F. Supp. 2d 364 (D.N.J. 1999) .....                                                                                                       | 4    |
| <i>Moore v. GMAC Mortgage</i> ,<br>No. 07-4296, 2014 WL 12538188 (E.D. Pa. Sept. 19, 2014) .....                                                                                      | 18   |
| <i>Osei v. Univ. of Maryland Univ. Coll.</i> ,<br>202 F. Supp. 3d 471 (D. Md. 2016), <i>remanded</i> , ___ F. App'x ___,<br>No. 16-2074, 2017 WL 838275 (4th Cir. Mar. 3, 2017) ..... | 5, 7 |
| <i>Pepper v. United States</i> ,<br>562 U.S. 476 (2011) .....                                                                                                                         | 9    |
| <i>Prall v. Bocchini</i> ,<br>No. 10-1228 (JBS-KMW), 2016 WL 1222263 (D.N.J. Mar. 29, 2016) .....                                                                                     | 5    |
| <i>QVC, Inc. v. OurHouseWorks, LLC</i> ,<br>No. 12-2871, 2016 WL 7491636 (E.D. Pa. Dec. 30, 2016), <i>appeal filed</i> ,<br>No. 17-1237 (3d Cir. Jan. 31, 2017) .....                 | 9    |
| <i>Schiller v. David's Bridal, Inc.</i> , No. 1:10-CV-00616-AWI,<br>2012 WL 2117001 (E.D. Cal. June 11, 2012) .....                                                                   | 19   |
| <i>Turner v. Murphy Oil USA, Inc.</i> ,<br>472 F. Supp. 2d 830 (E.D. La. 2007) .....                                                                                                  | 18   |
| <i>Valido-Shade v. Wyeth LLC</i> ,<br>57 F. Supp. 3d 457 (E.D. Pa. 2014) .....                                                                                                        | 8    |
| <i>Venuto v. Carella, Byrne, Bain, Gilfillan, Cecchi &amp; Stewart, P.C.</i> ,<br>11 F.3d 385 (3d Cir. 1993) .....                                                                    | 5    |
| <i>Warfield v. SEPTA</i> ,<br>No. 10-3023, 2011 WL 1899343 (E.D. Pa. May 19, 2011), <i>aff'd</i> ,<br>460 F. App'x 127 (3d Cir. 2012) .....                                           | 4, 5 |
| <i>Warrior Energy Servs. Corp. v. ATP Titan M/V</i> ,<br>551 F. App'x 749 (5th Cir. 2014) .....                                                                                       | 5    |
| <i>Williams v. CVS Caremark Corp.</i> ,<br>No. 15-5773, 2016 WL 4409190 (E.D. Pa. Aug. 18, 2016) .....                                                                                | 4    |
| <i>Wright ex rel. Trust Co. of Kan. v. Abbott Labs.</i> ,<br>62 F. Supp. 2d 1186 (D. Kan. 1999), <i>aff'd</i> , 259 F.3d 1226 (10th Cir. 2001) .....                                  | 5    |



## Rules

Fed. R. Evid. 702 ..... 8

## **I. INTRODUCTION**

Eleven days after the briefing of Class Counsel's fee petition was completed, the Alexander Objectors<sup>1</sup> unilaterally reopened it with a double-barreled volley that continues their unrelenting opposition to the petition. They filed a brief couched as their "Response and Objection" to Class Counsel's reply papers (ECF No. 7533) ("Resp. & Obj."). That brief was accompanied by a putative expert declaration (ECF No. 7533-1). Concurrently, the Alexander Objectors filed a motion for leave to serve Rule 34 document production requests on Class Counsel (ECF No. 7534) ("Mot.").

As to the first filing – the so-called Response and Objection – the Court should either strike it or, alternatively, refuse to consider it. The brief is a poorly-disguised sur-reply that the Alexander Objectors never sought leave to file. Courts routinely strike or disregard unauthorized sur-replies such as this. Nor is there any valid reason to allow it. Courts disfavor sur-replies because they are usually an attempt by the opponent to a motion to have the final say, and the Alexander Objectors' brief is a textbook example of such abuse. It rehashes all of the key points that they have raised in opposition to the fee petition – including arguments about the Settlement's valuation, whether a multiplier on Class Counsel's lodestar is appropriate, and whether the Court should adopt the requested 5% set-aside. Allowing this unsanctioned sur-reply would improperly give the Alexander Objectors the last word on Class Counsel's petition. *See* Section II.A, *infra*.

If the Court does not strike or decline to consider the sur-reply, Class Counsel respectfully request that the Court accept, as their sur-surreply, the substantive response to the

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<sup>1</sup> This memorandum adopts the shorthand definitions employed in Co-Lead Class Counsel's opening and reply memoranda in support of their fee petition (ECF Nos. 7151-1, 7464). Citations to docketed filings are to the ECF pagination.

Alexander Objectors' arguments that is set forth Section II.B of this memorandum. As discussed in that section, notwithstanding their denials, the Alexander Objectors' challenges to the methodology of Class Counsel's actuarial expert are backdoor attacks on the Settlement's compensation scheme, which this Court and the Third Circuit have already rejected. This Court specifically found that Qualifying Diagnoses of Level 1.5 and Level 2 Neurocognitive Impairment correspond to standardized dementia diagnoses drawn from well-established medical sources. Thus, Class Counsel's expert's projection as to how much is likely to be paid out in monetary awards under the 65-year term of the Settlement has an eminently sound basis. *See* Section II.B, *infra*.

The Alexander Objectors' remaining contentions are a repetition of the vacuous evidentiary objections they asserted with respect to Class Counsel's opening papers (namely, that supporting declarations are "conclusory" and lacking in foundation), stubborn insistence that Class Counsel are entitled only to their lodestar (which they maintain, without basis, is insupportable), opposition to the proposed 5% set-aside, and opposition to the proposed delegation of the initial allocation of common benefit fees to Co-Lead Class Counsel. None of this is a basis for denial of the petition. *See id.*

As to the companion filing, the Court should reject the Alexander Objectors' untimely request for leave to take discovery. This Court has generally disfavored discovery in the fee petition context. Nor is there a legitimate need for discovery at this late stage. Class Counsel have furnished ample information in support of their petition (including more than two dozen declarations, among which are two extensive declarations from Co-Lead Class Counsel), and the Court is well acquainted with the history of this litigation and the prodigious efforts of Class Counsel to secure this groundbreaking settlement and then defend it against a band of diehard

objectors, among whom were the Alexander Objectors. The Court thus has a full record before it and is in a position to make an informed determination on the petition. Moreover, the Alexander Objectors have already had ample opportunity to contest it. Discovery would serve no purpose other than to unnecessarily prolong these proceedings. *See* Section III, *infra*.

## **II. THE COURT SHOULD EITHER STRIKE OR DECLINE TO CONSIDER THE ALEXANDER OBJECTORS' UNAUTHORIZED "RESPONSE AND OBJECTION"**

### **A. The "Response and Objection" Is an Unauthorized Sur-Reply**

The Court should strike or, in the alternative, decline to consider the Alexander Objectors' self-styled "Response and Objections," including the declaration of their asserted expert, because their April 21st submission is an obvious sur-reply to Class Counsel's fee petition reply papers and the Court did not authorize its filing.

In accordance with the Court's March 8, 2017 Order (ECF No. 7261), on April 10, 2017, Co-Lead Class Counsel filed their omnibus reply papers (which responded to the objections to their February 13th opening papers and to the three objector cross-petitions for fees) (ECF No. 7464). Neither the Federal Rules of Civil Procedure nor this District's Local Rules provide for sur-reply filings, and this Court's March 8th Order certainly conferred no right on any objector to file one. Moreover, this Court's individual Policies and Procedures make clear that sur-replies may be filed *only* with the Court's permission. *See* <http://www.paed.uscourts.gov/documents/procedures/bropol.pdf>.

The Alexander Objectors did not request, let alone obtain, the Court's permission before filing their brief. Instead, on April 21, they unilaterally filed their "Response and Objection" (ECF No. 7533). No matter what they formally labelled their brief, it is of no moment. Even a cursory reading leaves no genuine doubt that it is a sur-reply. The brief does much more than merely assert evidentiary arguments. It renews attacks on the valuation of the Settlement (for

which the Alexander Objectors proffer a declaration from another putative expert to refute certain assumptions of Class Counsel’s expert economist, Dr. Thomas Vasquez), the appropriate methodology governing Class Counsel’s petition (*i.e.*, whether it is proper to evaluate the requested fees as a percentage of the recovery or whether Class Counsel are entitled only to their lodestar), the reasonableness of Class Counsel’s lodestar, whether a multiplier is warranted, and the requested 5% holdback on monetary awards (including the argument that all future common benefit work over the coming 65 years should be funded out of the \$112.5 million Attorneys’ Fees Qualified Settlement Fund). *See* Resp. & Obj. at 1-11; Declaration of Jamshid Lotfi, M.D., FRCP (London) (ECF No. 7533-1) (“Lotfi Decl.”) at ¶¶ 2-6.

There is no reason to allow any of this. The Alexander Objectors have already had their say concerning Class Counsel’s fee application and set-aside request – filing a 59-page brief in opposition to the petition (ECF No. 7355), along with a putative expert declaration that disputed the Settlement’s value (ECF No. 7355-1). Thus, they have been fully heard in this matter. They cannot go on mounting relentless attacks on Class Counsel’s fee petition and, even worse, slipping in the final word and additional evidence after the completion of briefing under the guise of asserting endless “objections” of one sort or another. Enough is enough.

This and other courts in this Circuit have routinely struck or refused to consider unauthorized sur-replies. *E.g.*, *Adams v. U.S. EEOC*, 932 F. Supp. 660, 663 (E.D. Pa. 1996); *Williams v. CVS Caremark Corp.*, No. 15-5773, 2016 WL 4409190, at \*3 (E.D. Pa. Aug. 18, 2016); *Warfield v. SEPTA*, No. 10-3023, 2011 WL 1899343, at \*1 n.2 (E.D. Pa. May 19, 2011), *aff’d*, 460 F. App’x 127 (3d Cir. 2012); *Mattern v. City of Sea Isle*, 131 F. Supp. 3d 305, 312-13 (D.N.J. 2015) (citing cases), *aff’d*, 657 F. App’x 134 (3d Cir. 2016); *Metz v. United Ctys. Bancorp.*, 61 F. Supp. 2d 364, 382 (D.N.J. 1999); *Martucci v. Procter & Gamble, Inc.*, No. 15-

4434 (JLL), 2016 WL 1408277, at \*1 n.1 (D.N.J. Apr. 11, 2016); *Prall v. Bocchini*, No. 10-1228 (JBS-KMW), 2016 WL 1222263, at \*4 n.2 (D.N.J. Mar. 29, 2016); *Charlton v. Werfel*, No. 2:13-05236 WJM, 2014 WL 2765718, at \*2 (D.N.J. June 18, 2014); *Laborers' Local Union Nos. 472 & 172 v. Buckler Assocs.*, No. 12-7119, 2013 WL 353441, at \*6 n.2 (D.N.J. Jan. 29, 2013); *see also Venuto v. Carella, Byrne, Bain, Gilfillan, Cecchi & Stewart, P.C.*, 11 F.3d 385, 388 & n.1 (3d Cir. 1993) (where district court refused to consider sur-reply memorandum, Court of Appeals granted motion to strike portions of appendix presenting excluded memorandum and supporting attachments). The Court should do likewise with the Alexander Objectors' unsanctioned submission.

Indeed, this and other federal courts universally recognize that sur-replies are disfavored. *E.g., Warrior Energy Servs. Corp. v. ATP Titan M/V*, 551 F. App'x 749, 751 n.2 (5th Cir. 2014); *Osei v. Univ. of Maryland Univ. Coll.*, 202 F. Supp. 3d 471, 479 n.6 (D. Md. 2016), *remanded on other grounds*, \_\_\_ F. App'x \_\_\_, No. 16-2074, 2017 WL 838275, at \*1 (4th Cir. Mar. 3, 2017); *Garcia v. Biter*, 195 F. Supp. 3d 1131, 1133-34 (E.D. Cal. 2016) (citing cases); *EMC Corp. v. Pure Storage, Inc.*, 154 F. Supp. 3d 81, 103 (D. Del. 2016); *Glass v. Lahood*, 786 F. Supp. 2d 189, 231 (D.D.C. 2011), *aff'd*, No. 11-5144, 2011 WL 6759550 (D.C. Cir. Dec. 8, 2011); *Wright ex rel. Trust Co. of Kan. v. Abbott Labs.*, 62 F. Supp. 2d 1186, 1187 n.1 (D. Kan. 1999), *aff'd*, 259 F.3d 1226 (10th Cir. 2001); *Warfield v. SEPTA*, 2011 WL 1899343, at \*1 n.2. And for good reason: "As many courts have noted, [s]ur-replies . . . usually are a strategic effort by the nonmoving party to have the last word on a matter." *Liberty Legal Found. v. Nat'l Democratic Party of the USA, Inc.*, 875 F. Supp. 2d 791, 797 & n.19 (W.D. Tenn. 2012) (citing cases; internal quotation marks omitted); *accord Lacher v. West*, 147 F. Supp. 2d 538, 539 (N.D. Tex. 2001). That is precisely what the Alexander Objectors have done here through the subterfuge of

filing a post-reply Response and Objection that restates sundry arguments in opposition to Class Counsel’s petition.

Nor can the Alexander Objectors genuinely excuse their unauthorized filing by claiming that Class Counsel adduced “supplemental” evidence with their reply papers. *See* Resp. & Obj. at 1. That evidence addressed only two discrete areas.

*First*, Class Counsel provided additional detail as to the work on behalf of the Class that lies ahead over the coming 65 years of the Settlement’s duration. ECF No. 7464-1 (Seeger Suppl. Decl. ¶¶ 14-38). But that is relevant to the request for the 5% set-aside on monetary awards, *not* the \$112.5 million common benefit fee and expense request on which the sur-reply principally focuses and which is the sole focus of the Alexander Objectors’ new expert.

*Second*, although Class Counsel submitted an updated valuation report from Dr. Vasquez (ECF No. 7464-12 [Seeger Suppl. Decl., Ex. JJ]), that was in order to address the Faneca Objectors’ inflated value *of the post-Fairness Hearing modifications to the Settlement*. *See* ECF No. 7464, at 53-54 & n.36. Otherwise, Dr. Vasquez’ updated report contained nothing new, save an upward projection of the Settlement’s value in light of a higher Class Member participation rate than what he had previously forecast, based upon data relating to the first two months of the registration period. *See* ECF No. 7464-12, at 4. Indeed, his report incorporated his February 2014 report in support of preliminary approval and his November 2014 declaration in support of final approval. ECF No. 7464-12, at 11-98 (Vasquez Report, Exs. 1-2).

The Alexander Objectors used the submission of Dr. Vasquez’ updated report as a pretext to call into question the original estimates of the Settlement’s value and whether it will be “successful” (Resp. & Obj. at 5). That is water long under the bridge inasmuch as the Court already determined the Settlement’s fairness, reasonableness, and adequacy, including its

projected value; addressed the very sort of challenges to the Levels 1.5 and 2.0 Neurocognitive Impairment Qualifying Diagnoses that the Alexander Objectors raise; and the Court specifically took Dr. Vasquez’ opinions into account in its analysis. *See In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 395-423 (E.D. Pa. 2015), *aff’d*, 821 F.3d 410 (3d Cir. 2016); ECF No. 6423-21 (Dr. Vasquez’ declaration in support of final approval, filed Nov. 12, 2014).

Simply stated, these two limited evidentiary submissions did not confer license on the Alexander Objectors to have the final say and rehash their various attacks on Class Counsel’s fee application, and to even assert indirect challenges to the Settlement itself (by adducing an expert declaration in order to question the extent to which Class Members can truly ever expect to see monetary compensation). Where, as here, reply papers merely responded to matters placed in issue by an opposition brief and did not spring new arguments upon an opposing party, there is no basis for allowing a sur-reply. *E.g.*, *Osei*, 202 F. Supp. 3d at 479 n.6 (denying leave to file sur-reply where defendants did not raise new legal theories or arguments for the first time in their reply brief); *16 Front St. LLC v. Miss. Silicon, LLC*, 162 F. Supp. 3d 558, 561 (N.D. Miss. 2016) (denying leave where reply “either address[ed] arguments in Plaintiffs’ response brief or provide[d] additional support for arguments raised in the initial brief and motion”); *Fulk v. Norfolk S. Ry. Co.*, 35 F. Supp. 3d 749, 752-53 n.1 (M.D.N.C. 2014) (denying leave where “Plaintiffs ha[d] not identified any of the arguments or issues they contend[ed] were raised for the first time in Defendants’ reply,” and “the reply was limited to addressing issues raised by Plaintiffs in their response brief”).

In sum, the Court should strike or refuse to consider this unauthorized sur-reply filing.



**B. In the Alternative, the Court Should Accept Class Counsel’s Substantive Response to the Alexander Objectors’ Latest Arguments So That Class Counsel Are Not Prejudiced by the Alexander Objectors’ Having the Last Word on the Petition**

If the Court declines to strike or to not consider the Response and Objection, Class Counsel respectfully request that it accept this substantive sur-surreply response so that Class Counsel are not prejudiced by the Alexander Objectors’ having the final written word on Class Counsel’s fee petition. As discussed below, the Alexander Objectors’ latest arguments are as meritless as everything else they previously asserted in opposition to the petition.

**1. Class Plaintiffs’ Expert’s Valuation of the Settlement Is Based Upon Sound Actuarial Principles and Underlying Facts That This Court Previously Found**

The Alexander Objectors incredibly claim that their so-called “methodology challenge” concerning the analysis conducted by Dr. Vasquez “is not a challenge to the Settlement.” Resp. & Obj. at 5. Plainly, it is.

The Alexander Objectors attack Dr. Vasquez’ life cycle forecasting model and ultimate valuation of the Settlement because, they claim, there are no historical disease incidence rates that can be used to predict incidence rates for the Qualifying Diagnoses of Level 1.5 and Level 2 Neurocognitive Impairment. Specifically, relying upon their asserted expert, Dr. Jamshid Lotfi, a neurologist,<sup>2</sup> the Alexander Objectors assert that incidence data for dementia used by Dr. Vasquez “are not reliable sources for predicting how many former players will have Level 1.5 or Level 2 diagnoses under the Settlement Agreement.” Lotfi Decl. at ¶ 5; see Resp. & Obj. at 3-4.

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<sup>2</sup> The Alexander Objectors ironically seek to have Dr. Vasquez’ opinion stricken under Fed. R. Evid. 702 and *Daubert* – whose applicability in the fee petition context is doubtful (see ECF No. 7464, at 17 n.8) – when they have not even proffered an expert in Dr. Vasquez’ field of expertise. Notably, Dr. Lotfi avers that his opinions are to a “reasonable degree of medical probability,” not a reasonable degree of medical *certainty*. See *Valido-Shade v. Wyeth LLC*, 57 F. Supp. 3d 457, 461 (E.D. Pa. 2014) (expert who opined to reasonable degree of medical probability “does not meet Pennsylvania’s requisite level of certitude” for “a viable expert opinion”).

What the Alexander Objectors ignore, however, is that the appropriateness of reliance upon dementia diagnoses and data already was a matter determined by this Court and the Third Circuit and thus is the law of the case. *KDH Elec. Sys., Inc. v. Curtis Tech. Ltd.*, 826 F. Supp. 2d 782, 801 n.17 (E.D. Pa. 2011) (“The [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.”) (citing *Pepper v. United States*, 562 U.S. 476, 506 (2011)); see also *In re Jamuna Real Estate, LLC*, 392 B.R. 149, 169 (Bankr. E.D. Pa. 2008) (law of the case doctrine “applies equally to factual findings” as it does to conclusions of law); *QVC, Inc. v. OurHouseWorks, LLC*, No. 12-2871, 2016 WL 7491636, at \*3 (E.D. Pa. Dec. 30, 2016) (same), *appeal filed*, No. 17-1237 (3d Cir. Jan. 31, 2017).

What underpins the Alexander Objectors’ criticism of Dr. Vasquez’ analysis and valuation is their expert’s assertion that Level 1.5 and Level 2 Neurocognitive Impairment are not recognized in medical literature or studies. Lotfi Decl. at ¶ 4; *accord* Resp. & Obj. at 2 (“These Qualifying Diagnoses are creations exclusively of and defined entirely by the Settlement. Neither a Level 1.5 nor a Level 2 neurocognitive disorder appear in published literature, research or even a medical textbook.”). That is unavailing.

Over two years ago, in connection with final approval, this Court was presented with “affidavits from eight physicians indicating that they [were] ‘not aware of the use of the diagnostic or classification categories’ of Levels 1, 1.5 and 2 Neurocognitive Impairment anywhere in the medical community.” *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. at 404 n.61. This Court, though, determined that fact to be “irrelevant” because “[a]lthough the precise terms are unique to the Settlement, the levels of impairment they represent are well established.” *Id.* Thus, the Alexander Objectors present nothing new – they simply recycle the

same arguments presented by *others* in opposition to final approval under the guise of an opposition to the fee request.

The Alexander Objectors also contend that Dr. Vasquez allegedly “grossly overestimate[s] the number of likely participants in the Settlement”<sup>3</sup> because, according to Dr. Lotfi, there are allegedly “lower requirements for a dementia diagnosis.” Resp. & Obj. at 3; Lotfi Decl. at ¶ 6. Again, this Court heard this argument previously, from *others*, and rejected it. In the face of objections that the Qualifying Diagnosis criteria were assertedly “unreasonably high” and would “prevent the compensation of many Retired Players whom physicians typically would diagnose with dementia,” this Court held that such concerns were “misguided” because the “cognitive and functional cutoffs are drawn directly from well-established sources.” *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. at 403. Thus, the Alexander Objectors’ contention that Dr. Vasquez overestimated the value of the Settlement because he based his projections on dementia data<sup>4</sup> is similarly misguided.

Specifically, as to the Qualifying Diagnoses of Level 1.5 and Level 2 Neurocognitive Impairment, and how they correspond to standardized dementia diagnoses drawn from well-established sources, this Court made the following detailed determinations:

- “These diagnoses correspond with commonly accepted clinical definitions of mild and moderate dementia, respectively.” 307 F.R.D. at 366 (footnotes omitted).

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<sup>3</sup> By the term “participants in the Settlement,” Class Counsel assume that the Alexander Objectors mean those who will obtain a monetary award under the Settlement.

<sup>4</sup> The dementia data upon which Dr. Vasquez originally relied in his February 10, 2014 NFL Concussion Liability Forecast (“February 2014 Forecast”), and continued to rely in his November 12, 2014 declaration and April 10th Updated Analysis of the NFL Concussion Settlement, consist of incidence rates from multiple sources for dementia and are contained in Appendix A to the February 2014 Forecast. *See* ECF No. 6423-21, at 58-61.

- “To receive a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment through the BAP, a Retired Player must perform 1.7-1.8 standard deviations worse than his expected level of preimpairment (‘premorbid’) functioning in two cognitive domains tested by the Test Battery, and exhibit mild functional impairment consistent with the National Alzheimer’s Coordinating Center’s Clinical Dementia Rating (‘CDR’) scale. Level 2 Neurocognitive Impairment requires a performance 2 standard deviations worse than a Retired Player’s expected premorbid functioning, and moderate functional impairment on the CDR scale.” *Id.* at 403 (footnote and internal citations omitted).
- “Both the cognitive and functional cutoffs are drawn directly from well-established sources. The Neurocognitive Disorders section of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM–5), a universally recognized classification and diagnostic tool, divides neurocognitive disorders into mild and major disorders based on the severity of the impairment. Major disorders require impairment 2 or more standard deviations below a person’s expected premorbid capabilities. When this type of impairment extends beyond a single cognitive domain, it corresponds with a diagnosis of moderate dementia. Mild disorders fall between 1 and 2 standard deviations below premorbid expectations. Empirical research demonstrates that 1.5 standard deviations below population norms is a relevant boundary—it substantially increases the likelihood of progression from a mild disorder to a major one.” *Id.* (internal citations omitted).
- “Thus, the levels of neurocognitive impairment recognized by the Settlement are empirically tied to the cutoffs in the DSM–5. . . . Level 2 matches the DSM–5’s definition of moderate dementia. Level 1.5 includes early dementia and begins at the midway point between Level 1 and moderate dementia.” *Id.* at 404 (footnotes omitted).
- “Objectors argue that the Test Battery does not resemble exams typically given by neuropsychologists in the field. This is incorrect. The Parties and their experts did not construct any test from scratch; each individual exam in the Test Battery is a well-established and validated tool for diagnosing neurocognitive impairment in any age group and is supported by extensive empirical testing to ensure its validity. . . . The cognitive domains tested in the Test Battery are those laid out in the Neurocognitive Disorders section of the DSM–5. Functional impairment is measured by the National Alzheimer’s Coordinating Center’s CDR scale, a validated and commonly-used scale for assessing the progression of dementia symptoms.” *Id.* at 412 (footnote and citations omitted).<sup>5</sup>

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<sup>5</sup> The Alexander Objectors also attempt to make hay out of the facts that (1) a user manual was created for diagnostic purposes in connection with the Settlement, *see* Resp. & Obj. at 4, and (2) Levels 1.5 and 2 Neurocognitive Impairment Qualifying Diagnoses could have been  
(Footnote continued . . .)

The Third Circuit agreed with this Court's determinations as to the correlation between the clinical definitions of mild and moderate dementia and Levels 1.5 and 2 Neurocognitive Impairment. Specifically, the Court of Appeals recognized that "Levels 1.5 and 2 Neurocognitive Impairment require a decline in cognitive function and a loss of functional capabilities, such as the ability to hold a job, and correspond with clinical definitions of mild and moderate dementia." *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 423 n.3 (3d Cir. 2016).

Consequently, Dr. Vasquez' use of dementia data to make projections as to Class Members' ultimately receiving Qualifying Diagnoses of Levels 1.5 and 2 Neurocognitive Impairment was appropriate. His valuation of the Settlement is thus sound and can be used to measure the propriety of the fees requested by Class Counsel.

## **2. Court-Appointed Lead Class Counsel Typically Make Allocations Among Those Firms That Performed Common Benefit Work**

In sections B and C of their Response and Objection, the Alexander Objectors take issue with Co-Lead Class Counsel's suggestion that he make, at least initially, the allocation of fees

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made (prior to the Effective Date) outside of the BAP, *id.* at 4 n.2. Both of these facts were known to and acknowledged by the Court. The Settlement Agreement clearly anticipated that "[a] user manual will be provided to neuropsychologists setting out the cutoff scores, criteria for identifying impairment in each cognitive domain, and statistical and normative data to support the impairment criteria." ECF No. 6481-1, at 116 (Settlement Agreement, Ex. 2, at 5). This Court specifically overruled the Alexander Objectors' objection that the Settlement was "'vague, ambiguous and/or not sufficiently disclosed' because among other things, the user manual participating physicians will receive setting out the specific cutoff scores for each test within the Test Battery has not been disclosed," holding that "this methodology is sufficiently clear from the Settlement and the record." 307 F.R.D. at 404 n.59. It also recognized that "Retired Players may also receive diagnoses of Levels 1.5 and 2 Neurocognitive Impairment outside the BAP, but the diagnosing physician must use similar criteria." *Id.* at 403 n.58.

among counsel who performed common benefit work. Resp. & Obj. at 7-10; *see* ECF No. 7151-1, at 69-70; ECF No. 7151-2, at 30 (Seeger Decl. ¶ 99). That contention also fails.

This Court has recognized that “submission of a combined fee application with actual allocation to be made by lead counsel has generally been adopted by the courts.” *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at \*17 (E.D. Pa. June 2, 2004) (citing cases). In deciding that lead counsel should have the initial responsibility for allocating fees from an aggregate award, courts have noted that, because lead counsel have led the litigation from inception, they are “better able to describe the weight and merit of each [counsel’s] contribution.” *Id.* at \*18 (quoting *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2002 WL 32154197, at \*23 (E.D. Pa. Oct. 3, 2002)). “[F]rom the standpoint of judicial economy, leaving allocation to such counsel makes sense because it relieves the Court of the ‘difficult task of assessing counsel’s relative contributions.’” *Id.* at \*18 (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 329 n.96 (3d Cir. 1998)).

Indeed, as Class Counsel have already noted, courts commonly delegate the initial allocation of class attorneys’ fees to lead class counsel. ECF No. 7151-1, at 69-70 (citing cases); *accord In re Indigo Secs. Litig.*, 995 F. Supp. 233, 235 (D. Mass. 1998) (directing that “[a]ny and all allocations of attorneys’ fees and expenses among counsel for all class representatives shall be made by lead counsel for the class, who shall apportion the fees and expenses based upon their assessment of the respective contribution to the litigation made by each counsel”); *In re Vitamin Cases*, No. 301803, 2004 WL 5137597, at \*8 (Cal. Super. Ct. S.F. Cnty. Apr. 12, 2004) (“Federal courts nationwide have recognized that lead counsel are generally better suited than the trial court to decide the weight and merit of the relative contributions made by those performing

common benefit work.”) (citing cases). Thus, there is nothing irregular or inappropriate about Co-Lead Class Counsel’s proposal.

Of course, courts may review the reasonableness of the allocation if a dispute arises. *E.g., In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 224-25 (D.D.C. 2005) (determining that co-lead counsel have broad authority to make initial allocation of fee award but once law firm objected, co-lead counsel’s decisions were subject to court review for an abuse of discretion). If any issues should arise from Co-Lead Class Counsel’s initial allocation of the Court’s award of fees and expenses, Co-Lead Class Counsel will make earnest efforts to resolve them so as to lessen, if not altogether avoid, the need for the Court’s involvement.

Finally, there is no merit to the Alexander Objectors’ lament that Co-Lead Class Counsel unfairly rejected their counsel’s claimed time. *See* Resp. & Obj. at 10 n.6. Obviously, based upon their prior submissions, Co-Lead Class Counsel do not believe that the Alexander Objectors and their counsel rendered anything of common benefit to the Class. If anything, they have acted only to the detriment of the Class. That the Alexander Objectors’ counsel was solicited to attend a meeting in an effort to stave off a meritless appeal of this Court’s final approval decision (which the Alexander Objectors eventually wound up filing anyway, thereby delaying the Settlement’s implementation) did not yield a common benefit to the Class.<sup>6</sup>

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<sup>6</sup> The Alexander Objectors also raise the same evidentiary objection concerning the Declaration of Bradford R. Sohn (ECF No. 7464-2) that they did with respect to every common benefit attorney’s declaration addressed in their March 27th objections. *See* ECF No. 7355, at 54-66. And they incredibly maintain that Co-Lead Class Counsel’s detailed declarations are “conclusory” and “without foundation.” Resp. & Obj. at 8-9. For the reasons already noted in Class Counsel’s reply memorandum, these objections are specious. *See* ECF No. 7464, at 23-25.



### **III. THE COURT SHOULD REJECT THE ALEXANDER OBJECTORS' ELEVENTH-HOUR BID FOR FEE PETITION-RELATED DISCOVERY**

From the time that Class Counsel filed their opening papers (back on February 13, 2017 [ECF No. 7151]) to the date that the briefing of their petition was completed (with the April 10, 2017 filing of their omnibus reply brief [ECF No. 7464]) a total of eight weeks elapsed. Although the Alexander Objectors made noises during that time about the need for discovery, including in their long-winded 59-page objections (ECF No. 7176, at 6; ECF No. 7355, at 14 n.9), at no time did they formally seek leave to take discovery. Only eleven days after the close of briefing on the fee petition did the Alexander Objectors fire off a motion for such leave.

Given that the claimed evidentiary gaps that the Alexander Objectors assert as the basis for their motion were alleged shortcomings in the fee petition papers filed more than two months earlier, the Alexander Objectors offer no explanation as to why they waited until now to seek discovery. The timing of their motion strongly suggests that it is calculated to protract the fee petition proceedings and frustrate Class Counsel's efforts to finally be compensated for their abundant work on behalf of the Class, if not to harass Class Counsel.

Whatever the case may be, there is no bona fide reason for allowing discovery. This Court has generally refused to allow discovery in connection with class counsel fee applications. *See In re Linerboard Antitrust Litig.*, No. MDL 1261, 2010 WL 3928638, at \*5 (E.D. Pa. Oct. 5, 2010) (citing cases). Although courts have *sometimes* allowed discovery in connection with class counsel fee petitions, typically that has been in statutory fee-shifting cases, where fees are being sought from a losing defendant that questions the reasonableness of the award that it is being asked to pay. *E.g., Avaya, Inc. v. Telecom Labs, Inc.*, No. 06-2490, 2016 WL 223696, at \*3, \*6 (D.N.J. Jan. 19, 2016) (plaintiff prevailed against defendant on antitrust claims and petitioned for \$59 million in fees; on defendant's motion, court directed plaintiff to produce



billing records). And even where it has been allowed, such discovery has been limited, not the fishing expedition upon which the Alexander Objectors now seek to embark. *Cf. id.* (requiring production of plaintiff's billing records after it petitioned for fees following victory on Clayton Act claim); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) (court permitted limited discovery of class counsel's lodestar data in TCPA action, but ultimately concluded that fees should be awarded on percentage-of-the-recovery basis), *appeals dismissed*, Nos. 15-1514 (7th Cir. May 5, 2015), 15-1546 (June 8, 2015), 15-1400, 15-1586, 15-1639 (June 26, 2015).<sup>7</sup>

Contrary to the Alexander Objectors' assertions, Class Counsel have adduced ample evidentiary support for their fee petition, including extensive declarations from Co-Lead Class Counsel and numerous declarations from the law firms that worked this case from start to finish. *See* ECF Nos. 7151-2 to 7151-28, 7464-1, 7464-2, 7464-12, 7464-13. (Of course, to the extent that the Court would like to see actual backup for the claimed time and expenses, Class Counsel stand ready to provide it *in camera*.) And, needless to say, the petition and request for adoption of a set-aside have been exhaustively briefed. *E.g.*, ECF Nos. 7151-1, 7161, 7344, 7346, 7350, 7355, 7464.

What is more, the Court is quite familiar with the extensive work over a period of nearly five years that went into achieving the result here, including the motion practice, the spirited negotiations and mediation, the attempts to derail the Settlement even before preliminary approval, the hard-fought Rule 23(e) final approval proceedings, and the appellate challenges to

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<sup>7</sup> Among other things, the Alexander Objectors want the various attorneys who provided declarations in support of the fee petition to produce all *drafts* of those declarations. Mot. at 4 (No. 10). That begs the question of what possible probative value drafts would have. One could go on and on about the Alexander Objectors' putative Rule 34 requests. Suffice it to say that they are intrusive and unwarranted.

the Settlement all the way up to the Supreme Court. Also, the Court is aware of the extent to which the Settling Parties worked extensively with their respective teams of experts and conducted informal discovery to put this complex, carefully-crafted, and historic deal together. In short, the Court is completely knowledgeable about the long course and intricacies of this litigation and has a sufficient record before it to be in position to make a fully informed determination as to whether Class Counsel have earned the fees and reimbursement of expenses that they have requested. *See Malchman v. Davis*, 588 F. Supp. 1047, 1061 (S.D.N.Y. 1984) (discovery by objectors not warranted where “a large record exists which is ample to permit decision on the relevant issues”), *aff’d as modified on other grounds*, 761 F.2d 893 (2d Cir. 1985). Discovery would *not* “aid the Court in conducting a meaningful review” of the petition. *See* Resp. & Obj. at 10 n.7. All that it would add to the proceedings is unjustifiable delay.

Given all this, the Alexander Objectors’ contentions that they need discovery because “Class Counsel has advanced nothing more than *ipse dixit* as a basis for an award of fees” (Mot. at 2) and because they have not had “a meaningful opportunity to object” to the petition (Resp. & Obj. at 10 n.7) are patently frivolous. As noted above, the Alexander Objectors have been afforded ample opportunity to contest the petition, and they exercised it with relish. The problem with the Alexander Objectors’ arguments – such as their insistence that Class Counsel cannot justify their requested fees because allegedly little work went into generating the Settlement, *e.g.*, ECF No. 7355, at 43-44 (asserting that complexity of case does not support Class Counsel’s petition because there was no discovery) – is that they reflect the same obtuse approach that they took in battling final approval of the Settlement, which is to close their eyes, cover their ears, and tune out whatever does not fit their narrative. As the saying goes, however, everyone is entitled to his own opinion, but not to his own facts.

Besides, the entire underlying premise of the Alexander Objectors' request for discovery into the reasonableness of Class Counsel's lodestar and the valuation of the Settlement is fundamentally flawed. Notwithstanding their obdurate and unsupported insistence to the contrary, this is a constructive common fund, *not* a fee-shifting, case, and a percentage-of-recovery analysis therefore applies. ECF No. 7151-1, at 39-40 (citing cases); ECF No. 7464, at 19-20 (same).<sup>8</sup>

That being the case, a lodestar cross-check is not even mandatory. *Moore v. GMAC Mortgage*, No. 07-4296, 2014 WL 12538188, at \*2 (E.D. Pa. Sept. 19, 2014); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 94 n.6 (D.N.J. 2001). To the extent that it is undertaken, class counsel's lodestar is not to be examined with pinpoint precision. Rather, a cross-check entails only a *rough* calculation of the lodestar in order to assess the reasonableness of the percentage award. *E.g.*, *Loudermilk Servs., Inc. v. Marathon Petroleum Co.*, 623 F. Supp. 2d 713, 717 (S.D.W. Va. 2009); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 861 (E.D. La. 2007) ("The lodestar analysis is not undertaken to calculate a specific fee, but only to provide a rough cross check on the reasonableness of the fee arrived at by the percentage method."); *Jasper v. C.R. England, Inc.*, No. 08-5266-GW(CWX), 2014 WL 12577426, at \*9 n.10 (C.D. Cal. Nov. 3, 2014) (because it was using lodestar method only as a cross check, "something it

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<sup>8</sup> Neither in their objections (ECF No. 7355) nor in their sur-reply have the Alexander Objectors cited any authority for treating this as a fee-shifting case, and they ignore authorities cited by Class Counsel to the contrary (ECF No. 7151-1, at 39-40; ECF No. 7464, at 19-20). All they offer is the myopic rationale that this ought to be treated as a fee-shifting case simply because the opposing party is funding the prospective fee award. Resp. & Obj. at 6. Class Counsel, though, did not file a fee petition against the NFL pursuant to a prevailing-party statute. Rather, their petition was filed in accordance with the very terms of the Settlement, pursuant to which the NFL agreed to pay Class Counsel's fees and expenses (so long as they do not exceed \$112.5 million) separate and apart from the recovery for the Class. See Settlement Agreement §§ 21.1 & 23.7 (ECF No. 6481-1, at 81-82, 90).

need not even do,” court did not need more detailed billing records and was “comfortable—based on its experience with class actions generally, and this case specifically—concluding that 5,500 hours expended on this litigation [wa]s generally reasonable”) (internal citations omitted); *Schiller v. David's Bridal, Inc.*, No. 1:10-CV-00616-AWI, 2012 WL 2117001, at \*22 (E.D. Cal. June 11, 2012); *In re Fine Host Corp. Secs. Litig.*, No. 3:97-CV-2619 JCH, 2000 WL 33116538, at \*5 & n.4 (D. Conn. Nov. 8, 2000) (court did not “exhaustively scrutinize[]” class counsel’s time entries “but instead relie[d] upon its familiarity with the case to utilize an approximate lodestar analysis as a cross check”). Further evidentiary development for the purpose of auditing Class Counsel’s lodestar is simply inconsistent with such a “back-of-the-envelope” validation.<sup>9</sup>

In short, the Alexander Objectors have articulated no legitimate basis for their proposed discovery foray at this late date. Accordingly, the Court should deny their motion.

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<sup>9</sup> As to the percentage of the recovery that Class Counsel’s requested award would represent, the Alexander Objectors’ ongoing attacks on the Settlement’s valuation are entirely beside the point, much less a basis for allowing discovery. Even accepting the \$607.3 million present value that one of their experts placed on the Settlement (*see* McCain Decl. ¶ 6 [ECF No. 7355-1, at 2]) – whose flawed assessment failed to take into account the value of the BAP, the Education Fund, the NFL’s funding of both notice and settlement administration, and the NFL’s payment of Class Counsel’s fees and expenses – the \$106.8 million fee component of the requested award (*see* ECF No. 7151, at 67) would still translate to an award equaling only about 17.6% of the recovery. That is well within the norm, even in cases involving so-called “mega-fund” recoveries, a point that Class Counsel noted in their reply (ECF No. 7464, at 20-21) and which the Alexander Objectors ignore. Of course, that percentage falls even further – to just 14.8% – if those overlooked benefits are factored in.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court should (i) strike or disregard the Alexander Objectors' April 24, 2017 "Response and Objection" (ECF No. 7533) or, in the alternative, accept Class Counsel's substantive response in Section II.B above as a sur-surreply; and (ii) deny the Alexander Objectors' motion for leave to serve post-briefing fee petition-related discovery (ECF No. 7534).

Date: May 5, 2017

Respectfully submitted,

/s/ Christopher A. Seeger

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on May 5, 2017.

/s/ Christopher A. Seeger  
Christopher A. Seeger

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
LITIGATION**

**KEVIN TURNER & SHAWN WOODEN**  
on behalf of themselves and others similarly  
situated

**V.**

**National Football League and  
NFL Properties LLC,  
successor-in-interest to NFL Properties, Inc.**

**THIS DOCUMENT RELATES TO:  
ALL ACTIONS**



**No. 12-md-2323 (AB)**

MDL No. 2323

**Civ. Action No. 14-00029-AB**

**ARMSTRONG OBJECTORS' REPLY IN RE: THEIR ATTORNEYS' FEE PETITION**

Class Counsel’s opposition to the Armstrong Objectors’ admittedly reasonable fee petition<sup>1</sup> is high on drama, but light on substance. The Armstrong Objectors respectfully file this brief Reply to Co-Lead Class Counsel’s Omnibus Fee and Expense Brief (Doc. #7464 at 56-63) to re-focus the discussion on the cold, hard facts.

**I. The Armstrong Objectors’ efforts resulted in the Collateral Time Benefit for Class Members.**

Class Counsel claims that the Armstrong Objectors’ appeals did not confer a Collateral Time Benefit on Class Members, feigning indignation at the Armstrong Objectors’ “attack on the integrity of the MAF physicians” (Omnibus Fee and Expense Brief at 60). How self-serving. Class Counsel further accuse the Armstrong Objectors of making a “vaporous statement that Class Members ‘distrust’ the NFL.” *Id.* Vaporous. Really?

Now that the settlement is final, Class Counsel apparently forget this is litigation. The NFL and Class Members are adversaries. The litigation arose out of Class Members’ distrust of the NFL’s billionaire owners who allegedly put profits before safety and defrauded Class Members out of their health and well-being. Because of Class Members’ distrust, this litigation commenced. And because of Class Members’ distrust, Class Counsel stand to be paid a handsome fee for performing little substantive work. Just because there is a settlement does not mean that Class Members’ deep-seated and long-standing distrust of the NFL magically disappeared. To suggest otherwise is intellectually dishonest.

The Collateral Time Benefit conferred upon Class Members by the Armstrong Objectors’ appeals is both real and valuable. *See, e.g.*, Declaration of McDonald Worley (Exhibit A). The minimal time delay in implementing the settlement is more than outweighed by the benefit to Class Members of being tested by neurosurgeons of their choosing—thereby potentially

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<sup>1</sup> Doc. #7230 and #7232.



maximizing their settlement benefits. *Id.* Class Counsel do not offer a scintilla of evidence to the contrary. The Armstrong Objectors' Counsel should be compensated for delivering this benefit.

**II. The final settlement contains improvements benefitting Class Members mirroring suggestions made by the Armstrong Objectors.**

Here, it's first important to note that Class Counsel do not dispute that on September 3, 2014, *more than a month before the objection deadline*, and long before any objections were filed on the Court's ECF by anyone, the Armstrong Objectors mailed their Objection to the Clerk of the Court as directed by the Court's preliminary approval order—which the Court eventually filed on the ECF. *See* Doc. #6353. In other words, the Armstrong Objectors—not the Faneca Objectors—were the first objectors to the table. In their comprehensive Objection (Doc. #6353) and subsequently filed Amended Objection (Doc. #6233), the Armstrong Objectors articulated sixteen detailed, multi-part objections to the Revised Settlement and concrete proposals for curing the defects—including, among others, suggestions to open up the BAP, extend the Death with CTE benefits eligibility period, and eliminate the \$1,000 appeal fee.

Although the final settlement does not include the precise enhancements for opening up the BAP, extending the Death with CTE benefits eligibility period, and eliminating the appeal fee advocated by the Armstrong Objectors (they advocated for more expansive revisions), the Armstrong Objectors' efforts certainly contributed to what was achieved.

Boiling Class Counsel's position down to its least common denominator, Class Counsel argues that the Armstrong Objectors' Counsel are not entitled to compensation for securing these enhancements because what was actually achieved does not precisely line up with what the Armstrong Objectors requested. Omnibus Fee and Expense Brief at 61-63. But that is not the standard. Nor does Class Counsel, in truth, want it to be the standard. Class Counsel did not settle this litigation for 100% of what they demanded. Thus, under Class Counsel's articulated

standard, they also should receive nothing for their efforts since they did not secure all of the relief they sought.

But again, that's not the standard. It's the concerted effort that counts. These three settlement enhancements were secured by the Armstrong Objectors' Counsel's efforts. It is undisputed they were the first ones to the table to suggest them. They should be compensated accordingly.<sup>2</sup>

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“‘[I]t is well settled that objectors have a valuable and important role to perform in preventing . . . unfavorable settlements, and . . . they are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts.’” *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 743 (3d Cir. 2001) (citation omitted).

The Armstrong Objectors' efforts improved the settlement, conferring additional benefits on Class Members. Their Counsel's requested fee award (straight time, no multiplier, and no expense request) is more than reasonable. Accordingly the Armstrong Objectors respectfully request that the Court award them attorneys' fees of \$599,700, and such other and further relief to which they are justly entitled.

Date: May 5, 2017

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<sup>2</sup> Class Counsel (and the Faneca Objectors) suggest the Armstrong Objectors' fee petition is a “knockoff” of the Faneca Objectors' fee petition. Omnibus Fee and Expense Brief at 56. But it's not. Class Counsel confuse the concept of a “knockoff” with hoisting the Faneca Objectors on their own petard. WILLIAM SHAKESPEARE, *HAMLET*, ACT 3, SC. 4.

Respectfully submitted,

/s/ Richard L. Coffman

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**COUNSEL FOR THE ARMSTRONG  
OBJECTORS**

**CERTIFICATE OF SERVICE**

I certify that a true copy of the Armstrong Objectors' Reply in re: their Attorneys' Fee Petition was served on all counsel of record, via the Court's ECF system, on May 5, 2017.

/s/ Richard L. Coffman

Richard L. Coffman

**COUNSEL FOR THE ARMSTRONG  
OBJECTORS**

# Exhibit A

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
LITIGATION**

**THIS DOCUMENT RELATES TO:  
ALL ACTIONS**

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**No. 12-md-2323 (AB)**

**MDL No. 2323**

**Civ. Action No. 14-00029-AB**

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**DECLARATION OF MCDONALD WORLEY**

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Pursuant to 28 U.S. C. §1746, I, **McDonald Worley**, declare as follows:

1. My name is McDonald Worley. I am an attorney licensed to practice law in the State of Texas, New York and D.C. and in the United States District Courts for the Eastern and Southern Districts of Texas.

2. I am an attorney in the law firm of McDonald Worley, P.C. I have been practicing law for twenty (20) years. I have personal knowledge of the facts stated in this declaration and, if called upon, I could, and would, testify competently to them. This declaration is made at the request of the Armstrong Objectors.

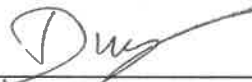
3. My law firm and I represent a number of NFL players in the above litigation. The Effective date of the settlement was not going into effect until all appeals were final. The final version of the settlement allowed for class members prior to the Effective Date to be evaluated by credentialed physicians of their choosing using testing and documentation that is "general consistent" but less onerous than required after the Effective Date. After the Effective Date, the living class members are now required to be evaluated by physicians specifically part of the

network created by the settlement who use the testing protocol and documentation specifically set out in the settlement.

4. While I understand that the appeals that were presented to the Third Circuit, and ultimately with an Application for Certiorari to the Supreme Court, were not for the reason of extending this deadline, it became a collateral benefit to the class that the Effective Date was extended. The Effective Date of the settlement became January 7, 2017, which gave all class members almost 19 extra months to obtain testing with their own neurosurgeons for purposes of obtaining a qualified diagnosis. Under the settlement, the effective date would have been 30 days after approval of the District Court (i.e., May 23, 2015). Due to these objections and appeals, the entire class was given a very important benefit. This benefit, in my opinion, is that it is more likely that each player I represent, as well as other class members, were given a better opportunity to qualify for one of the categories of benefits and/or qualify for a higher category of benefits, which will mean many more settlement dollars to my clients and all class members. In addition, many of my clients are, and have been, distrustful of the NFL for years, and having more time to choose their own doctor to obtain a qualified diagnosis is very valuable to them for peace of mind in the entire process and will more likely qualify them for a higher monetary benefit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 27<sup>th</sup>, 2017.



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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION**

**No. 2:12-md-02323-AB**

MDL No. 2323

**Kevin Turner and Shawn Wooden,  
on behalf of themselves and  
others similarly situated,**

**Plaintiffs,**

**V.**

**National Football League and  
NFL Properties, LLC,  
Successor-in-interest to  
NFL Properties, Inc.,**

**Civil Action No. 2:14-cv-00029-AB**

**Defendant.**

**THIS DOCUMENT RELATES TO:**  
**ALL ACTIONS**

**MEMORANDUM OF LAW IN OPPOSITION TO OBJECTOR PETITION FOR  
AN AWARD OF ATTORNEYS' FEES AND EXPENSES**

## TABLE OF AUTHORITIES

In Re: Cendant Court, PRIDES Litig., 243 F3D 722, 743 (Third Circuit 2001).

## Page 8

Turner v. NFL (In re NFL Players' Concussion Injury Litig.), 307 F.R.D. 351, 2015 U.S. Dist. LEXIS 52565 (E.D. Pa. 2015)

## Page 8

in In re NFL Players Concussion Injury Litig., 821 F.3d 410 (3d Cir. 2016)

## Page 8

Gilchrist v. NFL, 2016 U.S. LEXIS 7559, 137 S. Ct. 591, 196 L. Ed. 2d 473, 85 U.S.L.W. 3287, 2016 WL 4585281 (U.S. Dec. 12, 2016)

## Page 9

Armstrong v. NFL, 2016 U.S. LEXIS 7511, 137 S. Ct. 607, 196 L. Ed. 2d 473, 85 U.S.L.W. 3287, 2016 WL 7182246 (U.S. Dec. 12, 2016)

## Page 9

Trizechahn Gateway LLC v. Titus, 601 Pa. 637, 976 A.2d 474, 482-83 (Pa. 2009)

## Page 10

Tax Matrix Techs., LLC v. Wegmans Food Mkts., Inc., 154 F. Supp. 3d 157, (E.D. Pa. 2016).

## Page 10

In Re: Cendant Court, PRIDES Litig., 243 F3D 722, 743 (Third Circuit 2001).

## Page 10

Zucker v. Westinghouse Elec., 374 F.3d 221, 2004 U.S. App. LEXIS 13517 (3d Cir. Pa. 2004)

## Page 11

In re Card's Estate, 337 Pa. 82, 9 A.2d 557 (Pa. 1939)

## Page 15

Polonski v. Trump Taj Mahal Assocs., 137 F.3d 139, (3d Cir. N.J. 1998)

## Page 16

**OTHER:**



Pursuant to Fed. R. Civ. P. 23(h)(2) Class Members, Britt Hager, Rich Miano, Richard Brown, Kevin Sargent, Mark Rypien, Ron Davis, Gerry Allen, Scott Dierking, Brian Baldinger, Mike McCurry, John Goodman, Scott Laidlaw, Richard Stachon, Neil Graff, David Thompson, Ed Koontz, Jim Flanigan, Michael Hoban, Carlton Kammerer, Greg Brown, Rex Kern, Willie Williams, Charlie Hinton, June Jones, Jerry Kramer, Janice Womble on behalf of Royce Womble, Tra Thomas, Darnell Powell, Reggie Dupard, Bob Nelson, Jon Hand, Charles King, Bill Larson, Doug Lantz, Billy Van Heusen, Raymond Kubala, Lem Burnham, Michael McGill, Ken Frost, Craig Bingham, Mike Pagel, Chuck Thomas, Cris D'Annunzio, Jesse Green, Mike Phipps, Bethany Wirgowski on behalf of Dennis Wirgowski, John Stofa, Dana Nafziger, Doug Dennison, Bob DeMarco, Dave Dixon, Bill Schultz, James Pruitt, Thomas Cassese, Karl Nelson, Gene Heeter, Russell Jensen, Don Herrmann, Mark Collins, Guido Merkens, Craig Dunaway, Jacob Green, Danny Neal, Larry Kolic, Sonny Randle, Charles Benson, Dennis Franks, Travis Dorsch, Todd Hines, Ralph Baker, Ron Porter, Billy Ray Smith, Chris Gedney, Michael Fuller, Edward Wilson, Cheri Gaechter on behalf of Michael Gaechter, Joe Jones, Frederick Mazurek, Norris Williams, Bert Weidner, Aaron Francisco, Vaughn Broadnax, Dan LaRose, Vince Tuzeo, Guy Ruff, William Parker, Sembree Knapp, Harvey Goodman, Kenny Bell, Cleveland Wester, Richard Trapp, Carl Brettschneider, Roger Leclerc, Reggie Rivers, Curt Warner, Ted McKnight, James Cumbie, James "JB" Brown, Bruce Hardy, Irvin Eatman, Michael Horan, Joseph Cocozzo, Kristi Satterfield on behalf of Dick Evey, Darryl Ingram, Milt McColl,

Derwin Williams, Daryle Skaugstad, Anthony “AD” Laster, Brian McConnell, Dave Osborn, Andrew Selfridge, Steve Duich, Mike McDonald, Bill Ransdell, Joseph Biscaha, James Beirne, Bill Elko, John Skorupan, Joe Reed, Peter Cusick, Don Strock, Luke Fisher, Kent Nix, Kevin Call, Tim Green, Tom Reynolds, William “Don” Gillis, Charles Wilson, Paul Latzke, Clarence Harmon, Larry Wallace, Bryan Knight, Freeman White, Dennis Shaw, Richard Ackerman, Joseph Jackson, Carl Hinton, Kevin McArthur, Robbie Jones, Clarence Scott, Leroy Kelly, Don Latimer, Dale Messer, Terry Nugent, Derrick Beasley, Leroy Holt, Wayne Roby, Lenard Gotshalk, Michael Lemon, Mike Richardson, Harold Olsen, Champ Henson, William Brown, William Blackburn, Carla Brim on behalf of Michael Brim, Bill Glass, Len Hauss, Darnell Powell and Tom Jeter respectfully ask the Court to deny Objectors’ request for an award of attorney fees and reimbursement of expenses.

### **HISTORY OF LITIGATION**

In August of 2011 Former Atlanta Falcons safety Ray Easterling filed a lawsuit against the NFL for covering up the long term effects of concussions and brain trauma. Subsequently, he was joined by almost 5,000 of his former NFL teammates in an historic action against the league. In April of 2012 Ray Easterling took his life by shooting himself at the early age of 62. Easterling's unfortunate suicide was followed by many others.

In August of 2013 the NFL and retired players who had filed suit against the League announced a preliminary Settlement between them. That initial Settlement

was ultimately rejected by the Court. After numerous changes to its' terms, this Court granted Preliminary approval of the revised Agreement in July of 2014 and then granted final approval of the terms in April of 2015. Shortly after the Settlement received final approval, the implementation of the Settlement was delayed until January of 2017 due to appeals that were filed with the Third Circuit Court of Appeals and petitions for writs of certiorari filed with the United States Supreme Court. All appeals and petitions were denied and the settlement became effective on January 7, 2017.

## SUMMARY ARGUMENT

Mitnick Law Office, LLC (“Mitnick”), through its attorneys, hereby opposes, on behalf of its’ clients ("Mitnick clients”) who are part of the Class in the NFL Concussion Injury Litigation (“Concussion Litigation”), the Petition filed in this case by four clients of MoloLamken LLP (“MoloLamken”) requesting that MoloLamken be awarded \$20,051,827.52 in attorneys’ fees and expenses incurred during the concussion litigation.

After their fruitless attempt at appealing the Settlement, the objectors now ask this Court to award them in excess of \$20,051,827.52 in attorney fees and costs. The Objectors argue that "they did not attempt to "torpedo" or "block the settlement", but rather aimed to improve the benefits to retired players, however their efforts only caused an unwarranted delay in the implementation of the Settlement until January of 2017. This delay barred benefits from becoming available to Class members for

that period, as well as adversely and irreconcilably affecting the monetary awards of injured players forever into the future. The detriment to the Retired Class occurred in it's entirety due to the objectors conscious decision to file the appeals. Because the distributions from the Settlement are based, in large part, on the age of the claimant at the time of their diagnosed condition, class members will now receive substantially less compensation than if the appeals had not been filed.

The Petitioners/Objectors<sup>1</sup> (identified by their counsel as the “Faneca Objectors”) have been and are currently represented by MoloLamken in the Concussion Litigation. The Faneca objectors argue that their actions as objectors during the concussion litigation have brought about a tangible financial benefit in excess of \$100,000,000.00 to the class members. The Faneca objectors assert that the attorneys’ fees and expenses of MoloLamken should be paid from the Attorneys’ Fee Qualified Settlement Fund (“Attorneys’ Fee and Expense Fund”).

In support of their request, Petitioners submitted a 217 page, with exhibits, declaration by Steven F. Molo, Esquire of MoloLamken LLP and a 55 page Memorandum of Law. In his declaration, Mr. Molo acknowledges that he accepted the representation of his client “**...on a 100% contingent fee basis, with our fee based solely on our improving the settlement....**”(emphasis added) (See paragraph 8 of Molo Declaration). Petitioners in their 272 pages of submission fail

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<sup>1</sup> As stated in footnote 1 of the Molo declaration, MoloLamken originally represented seven objectors in this matter. Currently, there are only four active objectors since three individuals have opted out of the settlement. It is difficult to understand how MoloLamken’s representation of the four individuals who opted out of the settlement has benefited the more than 20,000 individuals who remained in the class. According to Paragraph 1.14 of the Basic Information FAQs posted at <https://www.nflconcussionsettlement.com/Un-Secure/FAQDetails.aspx?q=7#7>, the deadline to opt out of the Settlement was October 14, 2014.

to demonstrate how their conduct has improved the settlement for the over 20,000 member Class who were temporarily denied the ability to submit their claims, were denied the ability to have their claims evaluated, and were denied payment of their benefits as envisioned by the terms of the settlement until the implementation of the settlement began on January 7, 2017, a delay of nearly 2 years.

Under the terms of the settlement approved by the Court, the Attorneys' Fee Qualified Settlement Fund is to contain \$112,500,000.00. This fund is separate and distinct from the settlement fund created for the more than 20,000 class members which was approved by the Court. Paragraph 1.14 of the Basic Information FAQs posted at

<https://www.nflconcussionsettlement.com/UnSecure/FAQDetails.aspx?q=14#14>

describes in pertinent part the following regarding limited circumstances under which the attorney fee fund can be used to pay attorneys' fees and costs incurred in the concussion litigation:

An award of "common benefit" attorneys' fees and reasonable costs to Co-Lead Class Counsel, Class Counsel, Subclass Counsel and other attorneys who may have contributed directly to the establishment of the Settlement will be paid separately by the NFL Parties and not from the Baseline Assessment Program Fund, Education Fund or Monetary Award Fund. This award is subject to the approval of the Court.

It is the position of the Mitnick clients that neither the Faneca objectors nor their attorneys, as well as all other objectors who have filed similar fee petitions, have the right to recover any attorneys' fees or expenses incurred in this litigation

from the Attorneys' Fee Qualified Settlement Fund. The fund was meant to pay only the fees and expenses approved by the Court that were used to improve the common benefit of the members of the class.

"It is well settled that objectors have a valuable and important role to perform in preventing . . . unfavorable settlements, and . . . they are entitled to an allowance of compensation for attorney fees and expenses where a proper showing has been made that the settlement was improved as a result of their direct efforts . . . " *In Re: Cendant Court, PRIDES Litig.*, 243 F3D 722, 743 (Third Circuit 2001).

However, it is not well settled law that objecting attorney fees and expenses should be paid out of a pre-negotiated fee arrangement that was negotiated at arm's length between the Plaintiff and Defendant parties and that was intended only for the benefit of those parties.

The Mitnick clients contend that a review of the facts and history of this case reveals that the actions of the Faneca objectors did not result in a \$100,000,000.00 financial benefit to the class members. Rather, the Mitnick clients contend that in light of the actions of the Faneca objectors, between the time that the trial Court certified the settlement class in the concussion litigation by its opinion dated April 22, 2015 in *Turner v. NFL (In re NFL Players' Concussion Injury Litig.)*, 307 F.R.D. 351, 2015 U.S. Dist. LEXIS 52565 (E.D. Pa. 2015) and when each and every one of the issues raised on appeal in the 500 pages of briefing, argued by 11 different law firms on behalf of only 95 objectors were denied by the Third Circuit in its opinion issued on April 18, 2016, in *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410

(3d Cir. 2016), the objectors did nothing to benefit the Class. In fact, their actions in filing the appeals caused irreversible detriment to the Class through the delay triggered by the appeals. The Third Circuit at page 447 of its opinion made the following comment regarding the objectors:

....we do not doubt that objectors are well-intentioned in making thoughtful arguments against certification of the class and approval of this settlement. They aim to ensure that the claims of retired players are not given up in exchange for anything less than a generous settlement agreement negotiated by very able representatives. **But they risk making the perfect the enemy of the good...**(emphasis added).

It is contended that the Faneca objectors also should be held responsible for an additional eight-month delay caused by the filing of a writ of certiorari by objectors with the United States Supreme Court. The writ of certiorari was summarily denied by the U.S. Supreme Court in Orders dated December 12, 2016 in Gilchrist v. NFL, 2016 U.S. LEXIS 7559, 137 S. Ct. 591, 196 L. Ed. 2d 473, 85 U.S.L.W. 3287, 2016 WL 4585281 (U.S. Dec. 12, 2016) and Armstrong v. NFL, 2016 U.S. LEXIS 7511, 137 S. Ct. 607, 196 L. Ed. 2d 473, 85 U.S.L.W. 3287, 2016 WL 7182246 (U.S. Dec. 12, 2016).

It has been reported that while more than 11,000 class members were able to pre-register for Settlement updates, the unsuccessful court proceedings by objectors before the Third Circuit and United States Supreme Court unnecessarily delayed the ability of the members to register for actual benefits, submit their claims and to receive their intended compensation under the intent of the terms of the settlement agreement approved by the Court on April 22, 2015. See,

<https://www.usatoday.com/story/sports/nfl/2016/12/12/supreme-court-denies-nfl->

[concussion-case-settlement/95332068/](http://www.philly.com/philly/news/pennsylvania/Rollout-for-NFLs-1B-concussion-settlement-begins.html) and <http://www.philly.com/philly/news/pennsylvania/Rollout-for-NFLs-1B-concussion-settlement-begins.html>.

The appeals filed and pursued by the Faneca Objectors in conjunction with other objectors collectively represented the interests of less than .5% of the total class. Invocation of the appellate process resulted in almost a 2 year delay in the administration of the settlement approved by the Court on April 22, 2015. That delay has caused a severe irrevocable financial detriment to the injured members of the more than 20,000 member class. The financial hardship to the class far exceeds the \$100,000.000.00 in benefits that the Faneca objectors claim they created for the class. Clearly, the Faneca objectors in pursuing perfection, traveled a bridge too far and became an enemy to the good. Considering the severity of the damages caused by the resulting delays created by the Faneca objectors' appeals, the Petition for an award of Attorneys' Fees and Expenses filed by the Faneca objectors must be denied.

### **LEGAL ARGUMENT**

The American Rule provides that a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception. See, Trizechahn Gateway LLC v. Titus, 601 Pa. 637, 976 A.2d 474, 482-83 (Pa. 2009). See also, Tax Matrix Techs., LLC v. Wegmans Food Mkts., Inc., 154 F. Supp. 3d 157, (E.D. Pa. 2016). There is an exception to the rule in class litigation provided that the services rendered resulted in an improved settlement for the plaintiff. "It is well settled that objectors have a



valuable and important role to perform in preventing . . . unfavorable settlements, and . . . they are entitled to an allowance of compensation for attorney fees and expenses where a proper showing has been made that the settlement was improved as a result of their **direct efforts**. . . “ In Re: Cendant Court, PRIDES Litig., 243 F3D 722, 743 (Third Circuit 2001).

However, it is not well settled law that objecting attorney fees and expenses should be paid, let alone paid out of a pre-negotiated fee arrangement that was negotiated at arm’s length between the Plaintiff and Defendant parties and that was intended only for the benefit of those parties. See also, Zucker v. Westinghouse Elec., 374 F.3d 221, 2004 U.S. App. LEXIS 13517 (3d Cir. Pa. 2004) where the Third Circuit declined to endorse an interpretation of the common fund doctrine that created untoward incentives for attorneys to pursue unnecessary actions for pecuniary gain or to pursue such action.

Despite the fact that they were unable, through their appeal to the Third Circuit, to change/improve any of the terms or conditions of the settlement agreement approved by the Court on April 22, 2015, the Faneca objectors are nonetheless requesting that this Court award their attorneys in excess of twenty million (\$20,000,000) dollars in attorney fees and expenses incurred during the concussion litigation. The Faneca objectors and their attorneys voluntarily filed appeals that unsuccessfully questioned, as well as attacked, the fairness of the comprehensive negotiated Settlement Agreement.

Key to the valuation of each class member's claim is the age of the claimant at the time of their diagnosed condition. Under the terms of the agreement approved by the Court on April 22, 2015, the age of the claimant is one of the major components in determining a claimant's compensation. The value of a class member's claim substantially decreases each year that implementation of the settlement claims

process is delayed. A review of the settlement grid reveals that each year that an ALS claimant is required to wait, the average value of his claim is reduced by \$150,000. Each year that a Parkinson claimant is required to wait, the average value of his claim is reduced by \$66,000. Each year that an Alzheimer claimant is required to wait, the average value of his claim is reduced by \$50,000. Each year that a Level 2 neurocognitive impairment claimant is required to wait, the value of his claim is reduced by \$36,000. Each year that a Level 1.5 neurocognitive impairment claimant is required to wait, the value of his claim is reduced by \$13,000. Assuming that there are an equal number of claimants in each category, the average yearly reduction is approximately \$65,000/claimant. The potential adverse impact of the delay in evaluating and paying claims to the more than 20,000 members of the class is catastrophic.

The damage done by the Faneca objectors through their fruitless filings far outweighs any benefit that they may have potentially created prior to April 22, 2015. As a result, the Mitnick clients respectively request that the instant Petition for attorney fees and expenses be denied.

The Appellate process delayed implementation of the Settlement for several years even though in the end each and every one of the issues raised in the appeals were rejected by the Court. It is interesting to note that the Faneca objectors took their time in filing and briefing their meritless appeals, however they were much quicker in filing their fee petition with this Court. However, when it came time for

the Faneca objectors to file their fee petition with the Court, the document was filed just four days after the settlement became effective on January 7, 2017.

In deciding the issue as to whether the Faneca objectors or their attorneys are entitled to receive reimbursement or payment for the attorneys' fees and expenses incurred, it matters little regarding the qualifications of MoloLamken and/or its attorneys, or the pedigree of their opponents in other litigation. Faded into the background of the history of this class action are any novel arguments allegedly presented by MoloLamken; the expert witnesses purportedly developed by MoloLamken; and the voluminous submissions prepared by MoloLamken. Also, irrelevant to deciding this Petition are the numerous hours spent by the associates and partners of MoloLamken in preparing for and attending hearings, drafting briefs, performing discovery, attempting to independently negotiate a settlement with the NFL; and otherwise planning their strategies relating to this class action.

What has not faded to black in the memory of this litigation is the fact that after April 22, 2015, the Faneca objectors led the overly stubborn efforts to test the final settlement on appeal. The facts are that the Faneca objectors caused delays in their filings and blindly insisted to move forward with their appeals. None of this activity benefited the more than 20,000 members of the class.

Rather, the cold hard facts, as mentioned, are that the appeals caused severe detriment to every injured retired player in the Class. As the appeals were being fought, it was the players who grew older. As a result of the delay in implementing the provisions of the settlement, injured Retired Players will now receive

substantially less monies than if the meritless appeals had not been pursued.

Additionally, never once did the Faneca objectors request or recommend that a provision be set by the Court that would rectify the adverse impact that the age provisions contained in the settlement. Never once did the Faneca objectors take steps to post a bond to address the potential adverse impact that the delay of taking an appeal would result to the class members. Never once did the Faneca objectors take prudent steps in protecting the legal and financial interests of the more than 20,000 class members for whom Petitioners assert they were championing in their ill-advised appeal. In taking their appeal, Petitioners had placed themselves in a fiduciary relationship with the more than 20,000 class members to protect the interests of all of the class. By failing to protect the interests of the class, Petitioners caused irreparable harm to the financial interests of the class and as such forfeited their right to any compensation. See, Restat 2d of Trusts, § 243 (2012)(which addresses the effect of a trustee's breach of trust on the trustee's compensation. The provision in part provides that where a trustee commits a breach of trust, he is liable to the beneficiary for any loss thereby occasioned. It also provides that if the trustee intentionally or negligently mismanages the whole trust, he will ordinarily be allowed no compensation). See also In re Card's Estate, 337 Pa. 82, 9 A.2d 557 (Pa. 1939)(where the court found that a trustee may not be entitled to compensation when the trustee exceeds his discretion, such action can be regarded as a failure to discharge his duty).

Finally, Petitioners' argument that, even though MoloLamken agreed to work for their clients on a 100% contingency fee basis, they are entitled to recoup their fees and expenses from the Attorneys' Fee and Expense Fund created as part of the class settlement is clearly without merit. The Attorneys' Fee and Expense Fund is limited to reimbursing attorneys for their fees and expenses only when their services resulted in contributing to the common good of the class. The activities of MoloLamken after April 22, 2015, did not improve the settlement and in fact severely compromised the benefits that the class members will receive. Likewise, the assertion that MoloLamken is not charging any fees to its clients is of no relevance in determining whether the Petition should be granted. See, Polonski v. Trump Taj Mahal Assocs., 137 F.3d 139, (3d Cir. N.J. 1998)(where the Court found no "substantial service" was rendered to the entire class such as would justify an equitable award of attorney's fees).

### **CONCLUSION**

It is respectfully requested that the Petition filed in this case on behalf of four clients of MoloLamken LLP, requesting that MoloLamken be awarded \$20,051,827.52 in attorneys' fees and expenses incurred during the concussion litigation, as well as all other objector fee petitions be denied.

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CRAIG R. MITNICK, ESQUIRE

Date:\_\_\_\_\_

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN OF PENNSYLVANIA**

|                                                                               |                                                |                                                                                                                                         |
|-------------------------------------------------------------------------------|------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| <b>IN RE: NATIONAL FOOTBALL<br/>LEAGUE PLAYERS' CONCUSSION<br/>LITIGATION</b> | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | <br><br><br><b>No. 12-md-2323 (AB)</b><br><br><br><b>MDL No. 2323</b><br><br><br><b>THIS DOCUMENT RELATES TO:</b><br><b>ALL ACTIONS</b> |
|-------------------------------------------------------------------------------|------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|

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**RESPONSE IN OPPOSITION CO-LEAD CLASS COUNSEL'S MOTION  
TO STRIKE OR DISREGARD THE ALEXANDER OBJECTORS'  
UNAUTHORIZED SUR-REPLY 'RESPONSE AND OBJECTION' TO FEE  
PETITION REPLY PAPERS OR, ALTERNATIVELY, TO ACCEPT CLASS  
COUNSEL'S SUR-SURREPLY**

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Settlement Class Members Melvin Aldridge, Trevor Cobb, Jerry W. Davis, Michael Dumas, Corris Ervin, Robert Evans, Anthony Guillory, Wilmer K. Hicks, Jr., Richard Johnson, Ryan McCoy, Emanuel McNeil, Robert Pollard, Frankie Smith, Tyrone Smith, James A. Young Sr., and Baldwin Malcom Frank (collectively, the "Alexander Objectors") file this Response in Opposition to Co-Lead Class Counsel's Motion to Strike or Disregard the Alexander Objectors' Unauthorized Sur-Reply 'Response and Objection' to Fee Petition Reply Papers or, Alternatively, To Accept Class Counsel's Sur-Surreply (the "Petition") (ECF No. 7605, 7606). In short, Co-Lead Class Counsel's motion attempts to (i) circumvent Fed. R. Civ. P. 23(h)(2)'s notice and opportunity to be heard requirements, and (ii)

deprive the Alexander Objectors of the opportunity to preserve error through objection. For these reasons, and the reasons set forth in more detail in the accompanying Memorandum of Law, the Alexander Objectors respectfully request the Court deny the motion to strike or disregard. The Alexander Objectors are unopposed to Co-Lead Class Counsel's alternative motion to accept the self-titled "sur-surreply."

Date: May 12, 2017

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on May 12, 2017.

/s/ Justin R. Goodman

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN OF PENNSYLVANIA**

|                                                                               |                                                |                                                                             |
|-------------------------------------------------------------------------------|------------------------------------------------|-----------------------------------------------------------------------------|
| <b>IN RE: NATIONAL FOOTBALL<br/>LEAGUE PLAYERS' CONCUSSION<br/>LITIGATION</b> | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | No. 12-md-2323 (AB)<br><br><br><br><br><br><br><br><br><br><br>MDL No. 2323 |
| <b>THIS DOCUMENT RELATES TO:<br/>ALL ACTIONS</b>                              |                                                |                                                                             |

**MEMORANDUM OF LAW IN SUPPORT OF THE ALEXANDER  
OBJECTOR'S RESPONSE TO CO-LEAD CLASS COUNSEL'S MOTION  
TO STRIKE OR DISREGARD THE ALEXANDER OBJECTORS'  
UNAUTHORIZED SUR-REPLY 'RESPONSE AND OBJECTION' TO FEE  
PETITION REPLY PAPERS OR, ALTERNATIVELY, TO ACCEPT CLASS  
COUNSEL'S SUR-SURREPLY**

The Alexander Objectors ask that this Court deny Co-Lead Class Counsel's Motion to Strike or Disregard the Alexander Objectors' Unauthorized Sur-Reply "Response and Objection" to Fee Petition Reply Papers (ECF 7605, 7606) and for support would show as follows. The Alexander Objectors have no objection to Co-Lead Class Counsel's alternative Motion to Accept Class Counsel's Sur-Surreply.

**I. ARGUMENT**

**A. Co-Lead Class Counsel's motion to strike is an attempted end run around Fed. R. Civ. P. 23(h)(2).**

On March 8, 2017 the Court ordered that anyone objecting to Co-Lead Class Counsel's Petition for an Award of Attorneys Fee "must" file such

objection, in the prescribed form by March 27, 2017. On that same day, the Court ordered Co-Lead Class Counsel to distribute “Notice to All Settlement Class Members of Petition for Attorneys’ Fees, Costs, and 5% Holdback on Awards,” a notice—pursuant to Federal Rule of Civil Procedure 23(h)—that set forth the form of the objection and directed objectors to file “[a]ny other supporting papers, materials or briefs that you want the Court to consider in support of your objection.” The Alexander Objectors complied with the Court’s Order as set forth in the Notice.

At the same time on March 8, 2017, the Court authorized Co-Lead Class Counsel to “file an omnibus memorandum in reply to all objections, petitions, and other responses by April 10, 2017.” More to the point, the Court’s order did not authorize Co-Lead Class Counsel to file a reply with supporting papers or evidence. Nevertheless, Co-Lead Class Counsel attempted backfill the gaps in its fee petition with new evidence. Specifically, Co-Lead Class Counsel added several affidavits, including a new expert affidavit, in support of its fee-petition assertion that the attorneys’ fees sought are reasonable.

By filing the new evidence, Co-Lead Class Counsel disregarded this Court’s Rule 23(h) construct. The settlement class members did not have Notice of the new evidence before being required to respond to it. And, if Co-Lead Class Counsel succeeds in striking the Alexander Objectors’ response and

objection to the new evidence, Co-Lead Class Counsel will have thereby deprived the Alexander Objectors, as well as each and every other settlement class member, of the opportunity to object to the new evidence and point out the evidentiary flaws in that evidence. As the Court recognized in ordering the Notice provided at the outset, Rule 23(h)(2) affords the Class Members an opportunity to object to a Rule 23(h) petition for award of fees. Such notice and opportunity to be heard is completely eviscerated if, after a class member objects, the fee petition may be supplemented without a further opportunity to object.

Furthermore, the Alexander Objectors made substantive objections to the new (April 10, 2017) affidavit of Dr. Thomas Vasquez, an economist whose original and supplemental testimony are relied upon by Co-Lead Class Counsel to forecast, *e.g.*, how many Level 1.5 and Level 2 Settlement diagnoses may be anticipated based entirely upon dementia data. Because the magnitude of the flaw in the methodology of Dr. Vasquez' testimony is not readily apparent on its face, the Alexander Objectors relied upon a declaration of a neurologist—Jamshid Lotfi, Md.<sup>1</sup>—to support the objection and show the analytical gap in Dr.

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<sup>1</sup> Ironically, Co-Lead Class Counsel criticizes Dr. Lotfi for rendering opinions to a reasonable degree of medical probability rather than certainty – and yet, Co-Lead Class Counsel has offered this Court no neurological opinion whatsoever. The failure is significant as Co-Lead Class Counsel has the burden of proof on its Petition for Award of Fees. Where, then, is Co-Lead Class Counsel's expert testimony that: The criteria used for diagnosing a patient with Dementia using generally accepted diagnosing criteria are *materially the same* as the qualifying diagnosing criteria for a Level 1.5 or Level 2 neurocognitive impairment under

Vasquez opinion.<sup>2</sup>

Particularly where, as here, class counsel are asking the Court to award fees based upon a speculative model of benefits that may be paid—before any benefits have been paid—the uncompensated class members should have a chance to object to all evidence offered in support of that model. And where, as here, class counsel wish to be paid up front on a hypothetical settlement fund much of which may never be paid by the NFL<sup>3</sup>, class members should have a chance to object to all evidence offered to quantify the benefit they are allegedly going to receive. Due process requires it.

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the Settlement Agreement. An economist is unable to do so. *See Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993).

<sup>2</sup> Co-Lead Class Counsel now attempts to shore up their economist’s use of old dementia studies to extrapolate likely Level 1.5 and Level 2 diagnoses with reference to Settlement “findings.” The Court will recall that Co-Lead Class Counsel did not state during the Fairness Hearing that these levels are dementia; instead Co-Lead Class Counsel stated Level 1.5 is “what we call early or mild dementia” and Level 2 is “what we call moderate dementia.” *See* EFC 6463, 23-21, p. 13. This is hardly sound scientific methodology to rest a finding of “reasonable” fees on a guesstimated fund. Reference to the Settlement definition of these categories belies the bright-line tag Co-Lead Class Counsel urged their economist to use. And, Dr. Vasquez certainly did not rely upon the May, 2013 DSM-5 to support his analysis; in fact, Dr. Vasquez excluded every study mentioned after 2001 as “outliers.” *See* EFC 6423-21, p. 42.

<sup>3</sup> According to Co-Lead Class Counsel, the Settlement negotiated with the NFL sets forth a “10-year track record” methodology for NFL funding obligations. *See* EFC 6463, P. 203 (stating that “[w]e will have ten-year track record of having seen what claims have been approved by the claims administrator up to that point and we will be able to make reasoned assumptions going forward.”); *see also* Settlement, Article XXIII, 23.3(c). Co-Lead Counsel recognized – at least with regard to obtaining funds to pay class members – that historical eligibility data is the sound way to determine the funds needed from the NFL. Yet, with regard to fees, Co-Lead Class Counsel no longer feels such a track record is necessary for reasoned assumptions about the size of the fund.



**B. If granted, Co-Lead Counsel’s motion to strike would deprive the Alexander Objectors of the opportunity to preserve error through objection.**

Fed. R. Evid. 103(a) requires a party to timely object, specifically, to an offer of inadmissible evidence. F.R.E. 103(a). Rule 103(a) must be read in conjunction with Fed. R. Civ. P. 46. *See American Home Assur. Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985). While it is the general rule that an objection must be brought to the attention of the trial court to be raised on appeal, that rule presumes the “opportunity to do so. . . .” Fed. R. Civ. P. 46. The Alexander Objectors have had no other opportunity to object to the newly filed evidence. If this Court strikes the response and objection, as urged by Co-Lead Class Counsel and deprives the Alexander Objectors of the opportunity to be heard on the objections to the new evidence, Rule 46 teaches that the Alexander Objectors may raise these evidentiary objections on appeal because they have been denied the opportunity to do so before this Court. And, to the extent that the Court believes that the Alexander Objectors’ objections to newly-filed evidence or any other portion of the Response and Objections constitutes an “unauthorized sur-reply,” the Alexander Objectors ask this Court to grant them leave to permit the opportunity to object and show that Co-Lead Class Counsel is relying upon methodologically-unsound evidence.

**C. The Alexander Objectors Have No Objection to Co-Lead Class Counsel's Alternative Motion to Accept Class Counsel's Sur-Surreply**

The Alexander Objectors want the Court to have all admissible evidence and all argument before deciding Co-Lead Class Counsel's request for hundreds of millions of dollars in fees. Therefore, assuming the Court's consideration of the Alexander Objectors' Response and Objection to the new evidence, the Alexander Objectors do not oppose the Court's receipt, filing and consideration of Co-Lead Class Counsel's self-titled Sur-Surreply.

The Alexander Objectors want the Court to read that Co-Lead Class Counsel now emphasizes that the lodestar cross-check is not mandatory and therefore its inadequate fee declarations need not "be examined with pinpoint precision." See ECF 7606, p. 18. This is not a common fund. Co-Lead Class Counsel acknowledges that much. Arguing that this is a "constructive common fund", Co-Lead Class Counsel urged that the lodestar cross-check reveals the reasonableness of their fees without the need to perform "bean counting." See ECF 7151-1, p. 28, 53. Yet, Co-Lead Class Counsel still do not address (a) CMO 5 in which this Court ordered those "bean counting" records submitted and (b) the proffered declarations give the Court a mere two beans: hours and rate.

Because the Third Circuit says that performing a lodestar cross-check is "sensible," Co-Lead Class Counsel should not lead this Court into error. See *In re Rite Aid*, 396 F.3d 294, 305 (3d Cir. 2005). And, Co-Lead Class Counsel



should provide this Court and the parties through discovery, the CMO 5 data so that the Court can perform a meaningful lodestar cross-check.

## II. PRAYER

For the reasons stated, the Alexander Objectors request the Court (i) deny Co-Lead Class Counsel's Motion to Strike or Disregard the Alexander Objectors' Unauthorized Sur-Reply "Response and Objection" to Fee Petition Reply Papers and (ii) grant them such other relief as they show themselves entitled to receive.

Date: May 12, 2017

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on May 12, 2017.

/s/ Justin R. Goodman

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB  
MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Civil Action No. 2:14-cv-00029-AB

Plaintiffs,

v.

National Football League and  
NFL Properties, LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**FANECA OBJECTORS' REPLY IN FURTHER SUPPORT OF THEIR  
PETITION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES**

Like a lost soldier re-emerging from a cave long after the war has ended, attorney Craig Mitnick has re-emerged in this litigation. Early on, Mitnick signed a large number of former players to contingent-fee deals that will pay Mitnick handsomely when players begin receiving settlement awards.<sup>1</sup> As the docket reveals, and as Mitnick admits,<sup>2</sup> Mitnick did little substantive work – allowing Co-Lead Class Counsel to do the heavy lifting of negotiating with the NFL and

<sup>1</sup> Mitnick's website says that he represents over 1,400 retired NFL players and that he charges a 15% contingency fee. *See* Mitnick Law Office, LLC, *NFL Concussion Claim Resolution Center*, <https://playerinjury.com/> (accessed May 9, 2017).

<sup>2</sup> *See* Dkt. 7151-23 ¶2.

litigating the fairness of the settlement. But the prospect of a double-dip has lured Mitnick out into the light.

In addition to the fortune Mitnick will be paid for processing the paperwork of the players he signed up, he seeks a substantial payout – likely more than \$2 million – from the Attorneys’ Fees Qualified Settlement Fund.<sup>3</sup> He apparently now considers the Faneca Objectors’ petition for a fee award from the same large, but limited, fund a threat to his application. So, incredibly, *five months* after the Faneca Objectors filed their fee petition, Mitnick has filed a fantastical response. Mitnick’s lateness alone justifies disregard of his arguments.<sup>4</sup> More fundamentally, the extensive misstatements of fact and law in Mitnick’s belated memorandum reveal that he is unaware of what transpired in the fighting, as well as in the peace, while he was absent.

## **ARGUMENT**

### **I. Mitnick’s Misstatements of Fact**

*Mitnick claims* the Faneca Objectors’ appeal has caused class members to receive “substantially less compensation” than if the appeal were not taken because the age offset causes the “value of a class member’s claim [to] substantially decrease[] each year that the implementation of the settlement claims process is delayed.” In fact, the age offset is tied to the

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<sup>3</sup> The Faneca Objectors take no position on Mitnick’s request for attorneys’ fees. Mitnick submitted a declaration in support of Co-Lead Class Counsel’s petition claiming a lodestar of nearly \$900,000. *See* Dkt. 7151-23 ¶5. If Mitnick receives the same 2.6 lodestar multiplier sought by Co-Lead Class Counsel, his fee award could exceed \$2.3 million.

<sup>4</sup> *See* Dkt. 7261 (Order setting April 10, 2017 deadline to respond to objector fee petitions).

class member's "age at the time of the Qualifying Diagnosis," not the age at the time a claim is made.<sup>5</sup>

**Mitnick claims** the Faneca Objectors "should be responsible for an additional eight month delay caused by the filing of a writ of certiorari by objectors with the United States Supreme Court." In fact, the Faneca Objectors did not file for a writ of certiorari. Their fee petition clearly explains they studied the issue and determined – correctly – that the Court would not grant review.<sup>6</sup>

**Mitnick claims** the Faneca Objectors' counsel, MoloLamken LLP, spent "numerous hours . . . performing discovery." In fact, no discovery was performed and the Faneca Objectors' request for discovery was denied.<sup>7</sup>

**Mitnick claims** the "Faneca Objectors took their time in filing and briefing their meritless appeals." In fact, the Faneca Objectors supported Co-Lead Class Counsel's request for expedited briefing on the merits appeal in the Third Circuit and never requested an extension of the briefing schedule.<sup>8</sup> As for the Faneca Objectors' Rule 23(f) petition – that proceeded on an expedited basis and caused no delay in the fairness hearing, which was scheduled prior to the filing of the Rule 23(f) petition.<sup>9</sup>

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<sup>5</sup> Compare Dkt. 7621 at 6, 12-13, with Dkt. 6481-1 § 6.7(b) (age offset determined by "age at the time of the Qualifying Diagnosis"); *id.* § 6.3(c)-(d) (providing for Qualifying Diagnosis prior to Effective Date).

<sup>6</sup> Compare Dkt. 7621 at 9, with Dkt. 7070-2 ¶44 (Molo Declaration).

<sup>7</sup> Compare Dkt. 7621 at 14, with Dkt. 6245 (denying Faneca Objectors' Motion for Limited Discovery).

<sup>8</sup> Compare Dkt. 7621 at 13, with Faneca Objectors-Appellants' Notification of Consent to Class Plaintiffs-Appellees' Motion To Consolidate and To Expedite Appeals, *In re NFL Players' Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016) (No. 15-2304), Doc. No. 003111974350.

<sup>9</sup> See Dkt. 6084 (July 7, 2014 Order setting fairness hearing for November 19, 2014).

*Mitnick claims* the Faneca Objectors “fail to demonstrate how their conduct has improved the settlement.” In fact, the Faneca Objectors set forth in detail how their extensive efforts resulted in credit being given for play in NFL Europe, a waiver of the appeal fee in cases of hardship, the uncapping of the BAP for examinations, and enhancement of the benefit for CTE. The value of the enhanced benefits brought about through their advocacy is explained in detail in their fee petition and corroborated by expert analysis.<sup>10</sup>

## II. Mitnick’s Misstatements of Law

*Mitnick claims* that the law does not allow objectors to be paid from the Attorneys’ Fees Qualified Settlement Fund. In fact, Co-Lead Class Counsel has acknowledged that they can be,<sup>11</sup> and that conclusion is supported by ample authority, *see, e.g., In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (awarding objectors’ fees paid from class counsel’s award).

*Mitnick claims* the “qualifications of MoloLamken and/or its attorneys”; the “novel arguments . . . presented by MoloLamken”; the “expert witnesses . . . developed by MoloLamken”; the “voluminous submissions prepared by MoloLamken”; the “numerous hours spent by associates and partners of MoloLamken in preparing for and attending hearings, drafting briefs, performing discovery, attempting to independently negotiate a settlement with the NFL[,] and otherwise planning their strategies relating to this class action”; and MoloLamken’s 100% contingent-fee engagement “matter little” or are “irrelevant.”<sup>12</sup> In fact, this Circuit’s *Gunter/Prudential* analysis calls for a district court to consider “the skill and efficiency of the

<sup>10</sup> Compare Dkt. 7261 at 6-7, with Dkt. 7070-1 at 5-20, 32-39 (Faneca Objectors’ fee petition); Dkts. 7366-1, 7550-1 (supporting expert declarations).

<sup>11</sup> Compare Dkt. 7261 at 7, with Dkt. 7151-1 at 59 (Co-Lead Class Counsel’s fee petition).

<sup>12</sup> Dkt. 7261 at 14, 16.

attorneys,” “the complexity and duration of the litigation,” “the risk of nonpayment,” “the amount of time devoted to the case by . . . counsel,” and “any innovative terms of the settlement.” *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009).

***Mitnick*** ***claims*** the Faneca Objectors’ appeal to the Third Circuit was “fruitless” and “meritless,” accusing them of “blindly insist[ing] to move forward with their appeals.”<sup>13</sup> But the procedure for dealing with an obviously meritless or frivolous appeal is summary dismissal, *see* 3d Cir. R. 27.4, or summary decision without oral argument, *see* 3d Cir. R. 34.1(a). The Third Circuit did not do that. Instead, it heard over one hour of argument and issued a thorough, seventy-page opinion noting the Faneca Objectors were “well-intentioned” and made “thoughtful arguments” that “aim[ed] to ensure that the claims of retired players are not given up in exchange for anything less than a generous settlement agreement negotiated by very able representatives.” *In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 447 (3d Cir. 2016).

### **CONCLUSION**

The actual law and facts – as set forth in detail in the Faneca Objectors’ filings – support the requested fee award.

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<sup>13</sup> *See* Dkt. 7621 at 5, 14.

Dated: May 18, 2017

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Michele D. Hangley  
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Respectfully Submitted,

/s/ Steven F. Molo

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*Counsel for the Faneca Objectors*



**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2017, I caused the foregoing Faneca Objectors' Further Reply in Support of Their Petition for an Award of Attorneys' Fees and Expenses to be filed with the United States District Court for the Eastern District of Pennsylvania via the Court's CM/ECF system, which will provide electronic notice to all counsel and parties.

/s/ Steven F. Molo

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Civ. Action No. 14-00029-AB

**CO-LEAD CLASS COUNSEL'S REPLY MEMORANDUM IN FURTHER  
SUPPORT OF THEIR MOTION TO STRIKE OR DISREGARD THE  
ALEXANDER OBJECTORS' UNAUTHORIZED SUR-REPLY**

## **I. INTRODUCTION**

Co-Lead Class Counsel respectfully submit this short reply memorandum in further support of their motion (ECF No. 7605) to strike the Alexander Objectors' unauthorized sur-reply memorandum filed on April 21, 2017 (ECF No. 7533), and specifically to address the arguments in the Alexander Objectors' memorandum in opposition to Co-Lead Class Counsel's motion (ECF No. 7627) ("Opposition Memorandum" or "Opp. Mem.").<sup>1</sup>

## **II. THE ALEXANDER OBJECTORS OFFER NO VALID REASON FOR THE COURT NOT TO STRIKE OR DISREGARD THEIR UNAUTHORIZED SUR-REPLY**

The Alexander Objectors' opposition memorandum dishes out more of the same rhetoric about Class Counsel's fee petition and long-settled matters but fails to address the salient issue here: namely, that they did not request, let alone obtain, leave of this Court before filing the Response and Objection. In fact, they implicitly concede as much by asking the Court to accept their unauthorized sur-reply brief after the fact. *See* Opp. Mem. at 6.

Moreover, the Alexander Objectors pour more oil on the fire by continuing to take issue with Dr. Vasquez' valuation of the Settlement, which they attack as "speculative." *See* Opp. at 2-4. As Class Counsel pointed out, however, the issue of the Settlement's valuation is a ship that has long since sailed. Tellingly, the Alexander Objectors ignore Co-Lead Class Counsel's numerous references to this Court's detailed findings, already affirmed by the Third Circuit, as to the correlation between mild and moderate dementia and Level 1.5 and Level 2 Neurocognitive Impairment. *See* ECF No. 7606, at 14-18. That such judicial determinations are the law of the case is a fact from which the Alexander Objectors cannot run, try as they may.

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<sup>1</sup> This memorandum adopts the shorthand definitions employed in Co-Lead Class Counsel's opening and reply memoranda in support of their fee petition (ECF Nos. 7151-1, 7464), and opening memorandum in support of the instant motion (ECF No. 7606). Citations to docketed filings are to the ECF pagination.

Nor is there any merit to the Alexander Objectors' lament that striking their unauthorized sur-reply would deprive them of the opportunity to preserve objections. Opp. at 2-6. As previously noted, their sur-reply went well beyond merely asserting evidentiary objections by renewing their attack on the valuation of the Settlement and, indirectly, on the Settlement itself (for which they proffered a declaration from a neurologist); re-arguing that Class Counsel are entitled to fees only on a lodestar basis, not as a percentage of the recovery, and to no multiplier on their lodestar; disputing the reasonableness of Class Counsel's lodestar; and reasserting their opposition to a holdback on monetary awards. *See* ECF No. 7606, at 7, 9-10, 14-20; ECF No. 7533, at 1-8.

But even if the Alexander Objectors had some legitimate evidentiary objection to assert, they were obligated to request this Court's leave to do so. Neither the Federal Rules of Civil Procedure nor this Court's Local Rules give litigants an unfettered right to lodge objections to their adversaries' reply papers. Besides, any right or opportunity to preserve objections certainly does not carry with it the right to adduce sur-rebuttal evidence – which is what the Alexander Objectors unilaterally proffered in the form of Dr. Lotfi's declaration (ECF No. 7533-1).

No more availing are the Alexander Objectors efforts to take refuge in Rule 23(h) as the justification for their unilateral filing. *See* Opp. Mem. at 1-3. Any suggestion that the rule has not been satisfied in this case borders on the frivolous.

To begin with, as to the Rule 23(h)(1) requirement that a class receive notice of class counsel's fee application, Class Members were informed about a claim or potential claim for fees on no fewer than three separate occasions. *First*, the Class Notice had explicitly advised Class Members that (i) the NFL Parties would pay Class Counsel's fees separately from the Settlement funds; (ii) the NFL Parties had agreed not to oppose an award of up to \$112.5 million; (iii) there could be an additional set-aside of up to five percent of monetary awards for the purpose of

facilitating the Settlement program and Class Counsel’s efforts in connection with it; (iv) the matter of Class Counsel’s fees would be taken up after final approval of the Settlement; and (v) Class Members would have an opportunity to comment upon or object to a fee application at an appropriate time. ECF No. 6084-1, at 17 (§ 34: “How will the lawyers be paid?”). The short-form (*i.e.*, publication) Class Notice had similarly advised that the NFL Parties had agreed to pay Class Counsel’s fees of up to \$112.5 million separately from the Settlement funds and that a fee application would be made at a later date. ECF No. 6084-2.

*Second*, Class Members or their counsel who were registered on the Court’s ECF system received instantaneous notice of the filing of the petition on February 13th and were able to download the complete set of Class Counsel’s fee petition papers immediately upon their filing. *See* ECF No. 7151.

*Third*, in accordance with the Court’s March 8, 2017 Order (ECF No. 7260), Class Counsel mailed separate written notice of the filing of the fee petition to all Class Members. That notice advised Class Members of the deadline for lodging objections to the petition and that a complete set of the papers could be downloaded from the dedicated Settlement website ([www.NFLConcussionSettlement.com](http://www.NFLConcussionSettlement.com)), and it also set forth the procedure for filing objections (*see* ECF No. 7260, at 2-3).

All of this went over and above what the rule mandates. Rule 23(h)(1) “does not require [that] the moving attorney disseminate the entire text of the memoranda and declarations supporting the motion for fees, only that notice of the motion be given.” *In re Royal Dutch/Shell Transp. Secs. Litig.*, No. 04-374 JAP, 2008 WL 9447623, at \*35 n.12 (D.N.J. Dec. 9, 2008); *accord Stair ex rel. Smith v. Thomas & Cook*, 254 F.R.D. 191, 203 (D.N.J. 2008) (Rule 23(h)(1) “does not necessarily require such [fee] motion to be served on class members, but rather that it be ‘directed’

to them in a reasonable manner”) (quoting Rule); *see also Willis v. Nationwide Ins. Co. of Am.*, No. 09-5276, 2015 WL 12781606, at \*4 (E.D. Pa. Sept. 10, 2015) (“Notice of Class Counsel’s *intention to apply* for an award of attorneys’ fees and expenses has been provided to all persons in the class in a reasonable manner *and satisfies the requirements of Federal Rule of Civil Procedure 23(h)(1).*”) (emphasis added); *Moskalenko v. Express Stores, LLC*, No. 14-3684, 2015 WL 12803591, at \*4 (E.D. Pa. July 29, 2015) (same).

Here, not only were Class Members informed of Class Counsel’s intention to seek a fee award (and for how much), but they were also given notice of the fee petition itself, either by ECF notice or by the separate mail notice that furnished instructions on how to obtain a full set of the papers and file objections. *See In re Holocaust Victim Assets Litig.*, No. 06-0983 FB JO, 2007 WL 805768, at \*7 (E.D.N.Y. Mar. 15, 2007) (Rule 23(h)(1)’s mandate satisfied where “fee application [was] published on the Internet web site devoted to this case”), *report and recommendation adopted*, 528 F. Supp. 2d 109, 114 n.8 (2007).

As to the right under Rule 23(h)(2) of members of a class to object to a fee petition, the Alexander Objectors were plainly afforded that right here and they availed themselves of it by filing copious objections and adducing evidence on March 27th (ECF Nos. 7354-55). The Alexander Objectors’ contentions that their unauthorized sur-reply can be excused because Class Counsel “attempted to backfill the gaps in is fee petition with new evidence” (Opp. Mem. at 2) and that they would be denied due process if the Court strikes the sur-reply (Opp. Mem. at 4) are utterly devoid of merit. As Class Counsel have already explained (ECF No. 7606, at 12), the limited rebuttal evidence submitted as part of their reply papers addressed *only* (i) the Faneca Objectors’ cross-petition for fees (specifically, those objectors’ valuation of the February 2015 post-Fairness Hearing amendments to the Settlement, the majority of which they claim credit for

having brought about) and (ii) Class Counsel's request for a 5% holdback from monetary awards. As has been their wont, the Alexander Objectors simply tune out all of this.

The submission of this narrowly focused evidence did not confer *carte blanche* on the Alexander Objectors to adduce additional evidence and revisit issues relating to an entirely distinct application: Class Counsel's request for an award of common benefit fees. Whether because of a lack of understanding or otherwise, the Alexander Objectors have repeatedly confused and conflated Class Counsel's request for an award of common benefit fees (ECF No. 7151, at 1 [request no. i]; ECF No. 7151-1, at 13, 38-70; ECF No. 7151-2, at 1-31 [Seeger Decl. ¶¶ 1-100]) with Class Counsel's distinct request for the imposition of a set-aside or holdback on monetary awards (ECF No. 7151, at 2 [request no. iii]; ECF No. 7151-1, at 70-75; ECF No. 7151-2, at 1, 31-35 [Seeger Decl. ¶¶ 1, 101-19]). The former seeks compensation of counsel (out of the Attorneys' Fees Qualified Settlement Fund established pursuant Sections 21.2 and 23.7 of the Settlement and this Court's March 7, 2017 Order [ECF No. 7246]) for the work done through the end of 2016 that conferred a common benefit on the Class, whereas the latter does not guarantee a particular amount of fees to any attorney or firm but, rather, would create a pool of available funds to compensate counsel who perform *future* common benefit work in connection with the Settlement's implementation (and then only upon application to the Court). Evidence relating to one application is not necessarily pertinent to the other.

Irrespective of this critical distinction, no formulation of due process mandates that objectors be afforded the last word on a fee petition and the final evidentiary proffer in connection with it, much less that they be permitted to use Class Counsel's submission of rebuttal evidence addressing a fee petition filed by another objector as the pretext for doing so.

The Alexander Objectors' remaining arguments simply compound the impropriety of their unsanctioned sur-reply. They state that they have no objection to Co-Lead Class Counsel's alternative request that the Court accept a substantive response to their arguments as a sur-surreply (Opp. Mem. at 7-8) but then *proceed to make further substantive arguments in rebuttal*. Their additional arguments, though, are of no moment. The Alexander Objectors simply repeat their unsupported contention that this is not a constructive common fund case (ignoring Class Counsel's authorities to the contrary) and ignore all of the authorities cited by Co-Lead Class Counsel that a lodestar cross-check is not obligatory and, if one is undertaken, it is to be employed only as a rough calculation, not the full-fledged audit that the Alexander Objectors seek, including through unwarranted discovery (ECF No. 7606, at 24-25). For this reason, their citation of *In re Rite Aid Corporation Securities Litigation*, 396 F.3d 294 (3d Cir. 2005) (Opp. Mem. at 7), is puzzling. As Co-Lead Class Counsel noted in their April 10th reply memorandum in support of their petition, the Third Circuit in *Rite Aid* made clear that a lodestar cross-check "does not trump the primary reliance on the percentage of common fund method" and thus does not entail "mathematical precision [l]or bean-counting." *Id.* at 306-07 (cited in ECF No. 7464, at 23).



### **III. CONCLUSION**

For the foregoing reasons and those set forth in Co-Lead Class Counsel's opening memorandum (ECF No. 7606), the Court should strike or disregard the Alexander Objectors' April 21, 2017 "Response and Objection" (ECF No. 7533).

Date: May 19, 2017

Respectfully submitted,

/s/ Christopher A. Seeger  
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***CO-LEAD CLASS COUNSEL***

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on May 19, 2017.

/s/ Christopher A. Seeger  
Christopher A. Seeger

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

No. 2:12-md-02323-AB  
MDL No. 2323

THIS DOCUMENT RELATES TO:  
  
ALL ACTIONS

Hon. Anita B. Brody

**ORDER**

AND NOW, this 23<sup>rd</sup> day of August, 2017, pursuant to Federal Rule of Evidence  
706, it is **ORDERED** that:

- On or before **August 31, 2017**, any interested party must show cause why the Court should not appoint an expert witness on attorneys' fees;
- On or before **August 31, 2017**, any interested party must show cause why, having obtained his consent to serve as an expert witness in this matter, the Court should not appoint Professor William B. Rubenstein (CV attached) to serve as an expert witness on attorneys' fees.

  
ANITA B. BRODY, J.

Copies **VIA ECF** on \_\_\_\_\_ to:

Copies **MAILED** on \_\_\_\_\_ to:

## PROFESSOR WILLIAM B. RUBENSTEIN

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### ACADEMIC EMPLOYMENT

#### HARVARD LAW SCHOOL, CAMBRIDGE MA

|                                                                                  |                      |
|----------------------------------------------------------------------------------|----------------------|
| Sidley Austin Professor of Law                                                   | 2011-present         |
| Professor of Law                                                                 | 2007-2011            |
| Bruce Bromley Visiting Professor of Law                                          | 2006-2007            |
| Visiting Professor of Law                                                        | 2003-2004, 2005-2006 |
| Lecturer in Law                                                                  | 1990-1996            |
| <i>Courses:</i> Civil Procedure; Class Action Law; Remedies                      |                      |
| <i>Awards:</i> 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence |                      |
| <i>Membership:</i> American Law Institute; American Bar Foundation Fellow        |                      |

#### UCLA SCHOOL OF LAW, LOS ANGELES CA

|                                                                       |           |
|-----------------------------------------------------------------------|-----------|
| Professor of Law                                                      | 2002-2007 |
| Acting Professor of Law                                               | 1997-2002 |
| <i>Courses:</i> Civil Procedure; Complex Litigation; Remedies         |           |
| <i>Awards:</i> 2002 Rutter Award for Excellence in Teaching           |           |
| Top 20 California Lawyers Under 40, <i>Calif. Law Business</i> (2000) |           |

#### STANFORD LAW SCHOOL, STANFORD CA

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|---------------------------------------------------------------------------|-----------|
| Acting Associate Professor of Law                                         | 1995-1997 |
| <i>Courses:</i> Civil Procedure; Federal Litigation                       |           |
| <i>Awards:</i> 1997 John Bingham Hurlbut Award for Excellence in Teaching |           |

#### YALE LAW SCHOOL, NEW HAVEN CT

|                 |            |
|-----------------|------------|
| Lecturer in Law | 1994, 1995 |
|-----------------|------------|

#### BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

|                    |             |
|--------------------|-------------|
| Visiting Professor | Summer 2005 |
|--------------------|-------------|

### LITIGATION-RELATED EMPLOYMENT

#### AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

|                                    |           |
|------------------------------------|-----------|
| Project Director and Staff Counsel | 1987-1995 |
|------------------------------------|-----------|

Litigated impact cases in federal and state courts throughout the US. Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country, and coordinated work with private cooperating counsel nationwide. Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

#### HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

|           |         |
|-----------|---------|
| Law Clerk | 1986-87 |
|-----------|---------|

#### PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

|        |             |
|--------|-------------|
| Intern | Summer 1985 |
|--------|-------------|



W.B. Rubenstein Resume  
- August 2017

Page 3

*Expert Witness*

- ◇ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter*, declaration submitted to tribunals in Korea and Taiwan (2017))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 2017 WL 3175924 (N.D. Cal. July 21, 2017))
- ◇ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation*, Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))
- ◇ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation*, Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 2017 WL 1047834 (N.D. Cal., March 17, 2017))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.*, 2017 WL 1368741 (N.D. Ill., April 10, 2017))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC*, Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.*, Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company*, Case No. 11 Civ. 3487 (S.D.N.Y. 2015))
- ◇ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter

W.B. Rubenstein Resume  
- August 2017

Page 4

- that settled before trial (*Johnson v. Caremark RX, LLC*, Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))
  - ◇ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.*, Case No. 1:09-cv-00554 (D.R.I. (2015))
  - ◇ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))
  - ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc.*, 2015 WL 12732462 (C.D. Cal. May 29, 2015))
  - ◇ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation*, 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))
  - ◇ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)
  - ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation*, MDL 13-02424 (C.D. Cal. (2014))
  - ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))
  - ◇ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.*, Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))
  - ◇ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC*, Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))
  - ◇ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation*, Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))
  - ◇ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel,



W.B. Rubenstein Resume  
- August 2017

Page 5

- referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.*, 993 F. Supp. 2d 1154 (C.D. Cal. (2014))
- ◇ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.*, Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))
  - ◇ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems*, Case No. BC448383, California Superior Court, Los Angeles County (2013))
  - ◇ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck*, No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))
  - ◇ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.*, Case No. 3:12-cv-00589-REP (E.D. Va. (2013))
  - ◇ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of "net expected value" of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))
  - ◇ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))
  - ◇ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC*, Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))
  - ◇ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.*, Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))
  - ◇ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello*, 175 So. 3d 596, 609-10 (Ala. 2014))
  - ◇ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung*, Case No. BC 460783, California Superior Court, Los Angeles County (2012))
  - ◇ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP*, Case No. BC484090, California Superior Court, Los Angeles County (2011))



W.B. Rubenstein Resume  
 - August 2017

Page 6

- ◇ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.*, Case No. CIV-2008-1008-W (W.D. Ok. (2011))
- ◇ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*, Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))
- ◇ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))
- ◇ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation*, Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))
- ◇ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))
- ◇ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation*, 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))
- ◇ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))
- ◇ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))
- ◇ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))
- ◇ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.*, Case No. CV-05-3222 (C.D. Cal. (2010))
- ◇ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))
- ◇ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))
- ◇ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

W.B. Rubenstein Resume  
- August 2017

Page 7

- ◇ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))
- ◇ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))
- ◇ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))
- ◇ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))
- ◇ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))
- ◇ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))
- ◇ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))
- ◇ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))
- ◇ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))
- ◇ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif*, Case No. KC034700, California Superior Court, Los Angeles County (2008))
- ◇ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))
- ◇ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.*, JAMS Arbitration No. 1220026252 (2007))
- ◇ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.*, Civil Action No. 06-11033 PBS (D. Mass. (2007))

W.B. Rubenstein Resume  
- August 2017

Page 8

- ◇ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al.*, No. 07-39 (E. D. Ky. (2007))
- ◇ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.*, No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))
- ◇ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))
- ◇ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))
- ◇ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))
- ◇ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))
- ◇ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.*, Missouri Circuit Court, St. Louis, MO (2005))
- ◇ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))
- ◇ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City*, Case No. Civ. 2001-1827-C (W.D. Ok. (2002))
- ◇ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

#### Expert Consultant

- ◇ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))
- ◇ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)



W.B. Rubenstein Resume  
- August 2017

Page 10

(2008))

- ◇ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.*, Civil No. 8-04194 (E.D. Pa. (2008))
- ◇ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))
- ◇ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))
- ◇ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))
- ◇ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))
- ◇ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari*, Supreme Court of California (2006))
- ◇ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))
- ◇ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))
- ◇ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))
- ◇ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)
- ◇ Served as an expert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

#### *Ethics Opinions*

- ◇ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))
- ◇ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))
- ◇ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re*



W.B. Rubenstein Resume  
- August 2017

Page 11

*Professional Responsibility Inquiries (2011))*

- ◇ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))
- ◇ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))
- ◇ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

*Publications on Class Actions & Procedure*

- ◇ NEWBERG ON CLASS ACTIONS (sole author of supplements to 4th edition since 2008 and of 5th edition (2011-2017))
- ◇ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)
- ◇ *Procedure and Society: An Essay for Steve Yeazell*, 61 U.C.L.A. REV. DISC. 136 (2013)
- ◇ *Supreme Court Round-Up - Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)
- ◇ *Supreme Court Round-Up - Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)
- ◇ *Class Action Fee Award Procedures*, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)
- ◇ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)
- ◇ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)
- ◇ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)
- ◇ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases - At Least In Principle*, 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)
- ◇ *The Puzzling Persistence of the "Mega-Fund" Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)
- ◇ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)
- ◇ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

W.B. Rubenstein Resume  
- August 2017

Page 12

- ◇ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)
- ◇ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)
- ◇ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)
- ◇ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)
- ◇ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)
- ◇ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)
- ◇ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)
- ◇ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)
- ◇ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)
- ◇ *Supreme Court Round-Up*, 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)
- ◇ *Fee-Shifting For Wrongful Removals: A Developing Trend?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)
- ◇ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel*, 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)
- ◇ *Why The Percentage Method?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)
- ◇ *Reasonable Rates: Time To Reload The (Laffey) Matrix*, 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)
- ◇ *The "Lodestar Percentage: "A New Concept For Fee Decisions?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)
- ◇ *Class Action Practice Today: An Overview*, in ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)
- ◇ *Shedding Light on Outcomes in Class Actions*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

W.B. Rubenstein Resume  
- August 2017

Page 13

- ◇ *Finality in Class Action Litigation: Lessons From Habeas*, 82 N.Y.U. L. REV. 791 (2007)
- ◇ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees*, 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)
- ◇ *The American Law Institute's New Approach to Class Action Attorney's Fees*, 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)
- ◇ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?*, 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)
- ◇ *Supreme Court Round-Up*, 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)
- ◇ *On The Difference Between Winning and Getting Fees*, 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)
- ◇ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?*, 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)
- ◇ *On Plaintiff Incentive Payments*, 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)
- ◇ *Percentage of What?*, 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)
- ◇ *Lodestar v. Percentage: The Partial Success Wrinkle*, 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007)(with Alan Hirsch)
- ◇ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))
- ◇ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)
- ◇ *On What a "Private Attorney General" Is - And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).
- ◇ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)
- ◇ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)
- ◇ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)
- ◇ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) (excerpted in COMPLEX LITIGATION 120-123 (1998))



W.B. Rubenstein Resume  
- August 2017

Page 14

*Selected Presentations*

- ◇ *Class Action Update*, MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017
- ◇ *Class Action Update*, MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016
- ◇ *Judicial Power and its Limits in Multidistrict Litigation*, American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016
- ◇ *Class Action Update & Attorneys' Fees Issues Checklist*, MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015
- ◇ *Class Action Law*, 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015
- ◇ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014
- ◇ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013
- ◇ *Class Action Remedies*, ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013
- ◇ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda*, Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013
- ◇ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013
- ◇ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell*, UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013
- ◇ *Litigation's Mirror: The Procedural Consequences of Social Relationships*, Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012
- ◇ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012
- ◇ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

W.B. Rubenstein Resume  
- August 2017

Page 15

- ◇ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012
- ◇ *Recent Developments in Class Action Law and Impact on MDL Cases*, MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011
- ◇ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010
- ◇ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010
- ◇ *Unpacking The "Rigorous Analysis" Standard*, ALI-ABA 12<sup>th</sup> Annual National Institute on Class Actions, New York, New York, November 7, 2008
- ◇ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008
- ◇ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007
- ◇ *Current CAFA Consequences: Has Class Action Practice Changed?*, ALI-ABA 11<sup>th</sup> Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007
- ◇ *Using Law Professors as Expert Witnesses in Class Action Lawsuits*, ALI-ABA 10<sup>th</sup> Annual National Institute on Class Actions, San Diego, California, October 6, 2006
- ◇ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006
- ◇ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006
- ◇ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006
- ◇ *Class Action Fairness Act*, Arnold & Porter, Los Angeles, California, December 6, 2005
- ◇ *ALI-ABA 9<sup>th</sup> Annual National Institute on Class Actions*, Chicago, Illinois, September 23, 2005
- ◇ *Class Action Fairness Act*, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005
- ◇ *Class Action Fairness Act*, Thelen Reid & Priest, Los Angeles, California, May 12, 2005
- ◇ *Class Action Fairness Act*, Sidley Austin, Los Angeles, California, May 10, 2005



W.B. Rubenstein Resume  
- August 2017

Page 17

*Disability*

- ◇ Co-counsel in successful ADA challenge (\$500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

*Employment*

- ◇ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); (*Phillips v. Wisc. Personnel Commission*, 482 N.W.2d 121 (Wisc. 1992))

*Equal Protection*

- ◇ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))
- ◇ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc))
- ◇ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia's firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11<sup>th</sup> Cir. 1997))

*Fair Housing*

- ◇ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

*Family Law*

- ◇ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Svcs.*, 656 So.2d 902 (Fla. 1995))
- ◇ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

*First Amendment*

- ◇ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding for university student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))
- ◇ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

*Landlord / Tenant*

- ◇ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

W.B. Rubenstein Resume  
- August 2017

Page 18

*Police*

- ◇ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2<sup>nd</sup> Cir. 1994))

*Racial Equality*

- ◇ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 (*Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

*Editorials*

- ◇ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005
- ◇ *Play It Straight*, NEW YORK TIMES, October 16, 2004
- ◇ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004
- ◇ *Toward More Perfect Unions*, NEW YORK TIMES, November 20, 2003 (with Brad Sears)
- ◇ *Don't Ask, Don't Tell. Don't Believe It*, NEW YORK TIMES, July 20, 1993
- ◇ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

- ◇ Massachusetts (2008)
- ◇ California (2004)
- ◇ District of Columbia (1987) (inactive)
- ◇ Pennsylvania (1986) (inactive)
  
- ◇ U.S. Supreme Court (1993)
  
- ◇ U.S. Court of Appeals for the First Circuit (2010)
- ◇ U.S. Court of Appeals for the Second Circuit (2015)
- ◇ U.S. Court of Appeals for the Fifth Circuit (1989)
- ◇ U.S. Court of Appeals for the Ninth Circuit (2004)
- ◇ U.S. Court of Appeals for the Eleventh Circuit (1993)
- ◇ U.S. Court of Appeals for the D.C. Circuit (1993)
  
- ◇ U.S. District Courts for the Central District of California (2004)
- ◇ U.S. District Court for the District of the District of Columbia (1989)
- ◇ U.S. District Court for the District of Massachusetts (2010)
- ◇ U.S. District Court for the Northern District of California (2010)

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Civ. Action No. 14-00029-AB

**REQUEST FOR CLARIFICATION OF ORDER TO SHOW CAUSE  
REGARDING COURT-APPOINTED EXPERT AND  
REQUEST FOR EXTENSION OF TIME TO RESPOND TO ORDER TO SHOW CAUSE  
BY CLASS COUNSEL THE LOCKS LAW FIRM**

As Co-Class Counsel in this case and as an interested party to all proceedings, The Locks Law Firm respectfully requests that the Court clarify its Order to Show Cause of August 23, 2017 regarding why William B. Rubinstein should not be appointed by the Court as an expert on the subject of attorney's fees.

The Locks Law Firm also requests an extension of time to respond to the Order to Show Cause. The Locks Law Firm respectfully requests that the Court permit the Locks Law Firm ten



(10) days from the date the Court clarifies the Order to Show Cause to file a response to the modified Order.

The reasons for both requests are as follows:

1. Federal Rule of Evidence 706(b) requires that the Court inform a proposed expert of his duties as a court-appointed expert either in a writing filed with the clerk or at a hearing in which the parties are allowed to participate. Either method will allow the parties to understand the full scope and purpose of the expert's role and responsibilities under the proposed appointment.

2. Under the Court's Order to Show Cause, it is unclear to the Locks Law Firm what role and responsibilities Mr. Rubinstein would have under the proposed appointment.

3. For that reason, the Locks Law Firm respectfully requests that the Court issue a modified Order to Show Cause that sets forth in writing for the parties what role and responsibilities Mr. Rubinstein would have under the proposed appointment.

4. The Locks Law also respectfully requests that the Court grant it, as Class Counsel, an extension of time of ten (10) days from the date the Court issues a modified Order to Show Cause, so that The Locks Law Firm may respond to the modified Order in a meaningful way that includes, but is not limited to:

- a. a review Mr. Rubinstein's qualifications regarding the role and responsibilities for the proposed appointment set forth in the Modified Order to Show Cause;
- b. information and jurisprudence regarding the subject matter of the proposed role and responsibilities;
- c. the names of other possible experts who might fulfill the role and responsibilities identified by the Court; and

- d. the relationship, if any, between and among Mr. Rubinstein and counsel who have submitted applications for attorney's fees.

Respectfully submitted,

/s/ Gene Locks

Gene Locks

David D. Langfitt

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date a true and correct copy of the foregoing Request for Clarification and an Extension of Time by Class Counsel the Locks Law Firm was served via the Electronic Filing System to all counsel of record in Case No. 2:12-md-02323-AB, MDL No. 2323.

DATE: August 28, 2017

/s/ Gene Locks

Gene Locks, Class Counsel

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and others  
similarly situated,*

Plaintiffs,  
v.

National Football League, et al.,

Defendants.

THIS DOCUMENT RELATES TO  
Document 7151

) MDL No. 2323

) No. 2:12-md-2323-AB

) **Hon. Anita B. Brody**

) Civ. Action No. 14-00029-AB

**RESPECTFUL REQUEST FOR THE COURT TO APPOINT THE  
MAGISTRATE JUDGE TO DETERMINE PROPER ALLOCATION OF  
COMMON BENEFIT FUND**

In light of the fact that all of the parties to the litigation have relations  
(including the potential appointee), it is requested that the Court appoint the  
Magistrate Judge that the Court has already appointed for legal fee issues.

Most of the players I represent were retained in 2011 and 2012. Several years  
before, the class action was approved. A lot of work has gone into the case before and

after the class action approval. It would be best if the person who is placed in charge of evaluating legal fee issues is familiar with the work done both before and after the class action was approved.

Dated: August 29, 2017

Respectfully Submitted:

/s/ Nicole V. DeVanon  
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### **CERTIFICATE OF SERVICE**

I hereby certify that I have, this day, electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record on this 29th day of August 2017.

/s/ Nicole V. DeVanon

Girardi | Keese

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN OF PENNSYLVANIA**

|                                                                                                                                                                                       |                                                |                                                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------|-------------------------------------------------------|
| <b>IN RE: NATIONAL FOOTBALL<br/> LEAGUE PLAYERS’ CONCUSSION<br/> LITIGATION</b><br><hr style="width: 50%; margin-left: 0;"/><br><br><b>THIS DOCUMENT RELATES TO:<br/> ALL ACTIONS</b> | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | <b>No. 12-md-2323 (AB)</b><br><br><b>MDL No. 2323</b> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------|-------------------------------------------------------|

**The Alexander Objector’s Response to the Court’s Show  
Cause Order of August 23, 2017 Regarding Appointment  
of a Court Expert on Attorneys’ Fees**

On August 23, 2017, this Court entered an order [ECF No. 8310] directing all interested parties to show cause pursuant to Fed. R. Evid. 706:

1. Why the Court should not appoint an expert witness on attorneys’ fees; and
2. Why the Court should not appoint Professor William B. Rubenstein to serve as an expert on attorneys’ fees.

The Alexander Objectors show cause as follows:

I.  
The Court should not appoint an expert witness on attorneys’ fees

**A. The Court should not appoint any expert witness on attorneys’ fees.**

1. The Court should not appoint any expert on attorneys’ fees because such appointment does not meet the Rule 706 criteria.

“Few and far between are cases appropriate for a Rule 706 appointment.” *See McCracken v. Ford Motor*, 392 Fed. Appx. 1, 3 (3 Cir. 2010), citing 29 Charles Alan Wright & Victor Gold, *Federal Practice and Procedure* § 6304 (1st ed.). According to one survey, judges generally view the appointment of a neutral expert as an “extraordinary activity that is appropriate only in rare instances in which the

traditional adversarial process has failed to permit an informed assessment of the facts.” Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706* (Fed. Jud. Center 1993).

Under any circumstance, however, court appointment of an expert ordinarily occurs only when the Court needs assistance with “complex scientific, medical, or technical matters.” *See Armstrong v. Brown*, 768 F.3d 975, 987 (9th Cir. 2014). Attorneys’ fees, particularly where there is no data to review, is not such a complex issue.

Moreover, someone will be required to pay for the court-appointed expert. Rule 706 expert witnesses are taxed as court costs. *See, e.g. Sams v. State Attorneys Gen.* (In re Cardizem CD Antitrust Litig.), 481 F.3d 355, 362–4 (6th Cir.2007) (noting that 28 U.S.C. § 1920(6) authorizes the recovery of costs for court appointed experts under Federal Rule of Evidence 706. And, if the Court appoints a Rule 706 expert, the parties will need to depose the expert on his opinion. *See Fed. R. Evid.* 706(b)(2) & (b)(4) (stating that “the expert may be deposed by any party” and “may be cross-examined by any party, including the party that called the expert”).

On the other hand, if Class Counsel would submit to attorneys’ fee discovery or if the Court would order such discovery, as previously requested by the Alexander Objectors, the adversarial process would remain intact and the attorneys’ fee opinions of Class Counsel could be tested for the Court’s impartial consideration. The Alexander Objectors reurge their request to take discovery of Class Counsel’s fees that has been pending since April 21, 2017. *See Motion for Leave to Serve Fee-Petition Discovery*, ECF No. 7534. If permitted to engage in this discovery, the Alexander Objectors could supply the Court with information from which the Court could assess the evidence, the parties’ competing expert opinions, and the advocacy of the parties to resolve the fee question.

2. The Court should not appoint any expert on attorneys' fees because the fee petition is still premature.

The Court should not appoint any expert on attorneys fees *until* there is a claims-administration track record for the Settlement and, therefrom, data to support the quantified benefit to the class members. The Alexander Objectors have previously urged that the NFL claims should be processed ahead of any fee petitions. It is the right thing to do and it is consistent with other large, contingent MDL fee petitions. *See In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, 2:10-md-02179, ECF 21849 (October 28, 2016) (reflecting *Deepwater Horizon* counsel waited four years and until 9 billion in Settlement benefits were paid to present their common benefit fees).

The NFL Players' claims are moving at a snail's pace while Class Counsel attempt to move their fee petition as the wind. Claims processing began on March 23, 2017 and registration is now closed. The Court received the most recent Joint Status Report on June 15, 2017 [ECF 7827]. As to registrations, the Parties disclosed that, as of June 5, 2017, 14,507 people have submitted registration forms, including 12,082 Retired NFL Football Players, 546 Representative Claimants and 1,879 Derivative Claimants. *See* ECF 7827, p. 3. As to claims processed, however, the administrator has authorized payment of only two (2) out of the 869 total claims made. *See* ECF 7827-1, p. 9. More specifically, on May 26, 2017, the BAP Administrator authorized – subject to lien resolution - the first payment for a qualifying diagnosis. *Id.* Then, on June 5, 2017, the BAP Administrator authorized the second payment for a qualifying diagnosis, again subject to lien resolution. *Id.* 2 out of 869.

Brewing disputes over the “interpretation” of the settlement terms is one of the reasons claims administration is dragging. Specifically, as the Court is aware, Absent Class Member Yvonne Sagapoutele recently filed her Motion to Modify the

Amended Final Order and Judgment to conform the definition of “Death with CTE” with the Class Notice and Summary Notice. *See* ECF 8263. According to the motion, Class Members have become aware that the 2017 Pre-Effective Date Diagnosing Physician Certification Form incorporates a deadline that was added to the Settlement, apparently without the Court’s knowledge. *See* ECF 8263, p. 12. Ms. Sagapoutele’s is not the only challenge to the administration of the Settlement according to terms. Several NFL Players have filed a motion to Determine Proper Administration of Claims urging that Brown Greer is administering claims under materially altered terms of the Settlement.<sup>1</sup> Class Counsel and the NFL jointly asked for an extension to respond to the serious allegation. *See* ECF No. 8302. The movants opposed the requested extension and relied upon the affidavit of Michael G. St. Jacques; he relates a telephone conference in which Mr. David Smith, Supervisor of NFL Claims with Administrator Brown Greer, (a) acknowledged imposing requirements on claimants that are not part of the plain language of the Settlement, but (b) indicated that, upon the direction of Class Counsel and the NFL Parties, BrownGreer implemented the requirement as an interpretation of the Settlement. *See* ECF No. 8309-1, ¶¶ 10-13.

Subsequently, Counsel The Locks Law Firm independently sought additional time based specifically on its breadth of knowledge on the question of deviation from the Settlement terms— having filed more claims than any other Class Counsel and having received more notices of deficiency on the relevant claims. *See* ECF No. 8329. The Court granted the Joint motion and extended the deadline to respond to

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<sup>1</sup> Specifically, the motion alleges that “the Claims Administrator has added language to the phrase “corroborated by documentary evidence” contained in Section 1(a)(iii) and 2(a)(iii) of Exhibit 1 to the Settlement Agreement, such that the phrase now means “corroborated by documentary evidence that existed before the date of the Qualifying Diagnosis . . . ”; that the additional language is not contained in the Settlement Agreement; and that inclusion of such language modifies the requirements to qualify for a Monetary Award under the Settlement Agreement. *See* ECF No. 8267, p. 2.



the Motion to Determine Proper Administration of Claims to September 28, 2017. *See* ECF No. 8324.

In light of the above, not only is it fair and just to wait to adjudicate the fee petition, it is prudent and necessary because the terms of the Settlement, and thereby the number of claimants entitled to participate are currently in flux. If the Court or a court-appointed expert decides to (a) move forward without an established claims-payment history and (b) accept Class Counsel's prognostication about the size of this fund – which is “uncapped” but reversionary in nature (vs. the size of the recovery), time will tell whether these attorneys were actually awarded an obscene percentage of the claims actually paid. *See e.g. Int'l Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., concurring in denial of petition for certiorari) (noting that once the claims were paid from the reversionary fund, the fee award approved by the District Court was more than twice the amount of the class' actual recovery but, because the issue was waived, the Court could not reach the question whether there must at least be some rational connection between the fee award and the amount of the actual distribution to the class). The Court should delay the petition to avoid such hindsight analysis of the fees in this case.

In short, while Class Counsel is still defending – or attempting to refine - the terms of the Settlement, it is simply too soon for them to contemporaneously declare victory and seek their full fee and a bonus.

**B. The Court should not appoint any expert on attorneys' fees *until and unless* there is something (such as fee statements) for the expert to consider.**

The Alexander Objectors have previously pointed out

- the failure of Class Counsel to comply with this Court's Case Management Order No. 5, entered *five years ago* in September, 2012, that established a protocol for class counsel to maintain “contemporaneous time and expense records” which document compensable time and expenses, in categories designated by the Court, within limitations specified by the Court.

- the need for attorneys' fee data for the Court to review and assess in connection with Class Counsel's fee petition. *See Stetson v. Grissom*, 821 F.3d 1157 (9th Cir. 2016) (noting that the Court must have a way to determine whether the hours billed were redundant, excessive, or otherwise unnecessary); *see also* ECF No. 776, Motion for Entry of Case Management Order Governing Applications for Attorneys Fee; Cost Reimbursements; and Future Fee Set-Aside, asking this Court to establish a schedule for filing and vetting common-benefit fee petitions in accordance with Article XXI Of the Settlement. That February 21, 2017 motion remains pending.

Because there is no attorneys' fee data to review at this time, beyond conclusory hour-and-rate fee declarations to which the Alexander Objectors have previously objected, it is premature to appoint any expert to perform that task. In other words, if the Court-appointed expert on attorneys' fees is intended to review the data about, e.g., what services the attorneys performed and render an opinion on the reasonableness of it, such a review must necessarily await the data.<sup>2</sup>

If, on the other hand, Professor Rubenstein or another expert is intended to opine on attorneys' fee methodology, the appointment is premature for an entirely different reason: There is no reliable data upon which to opine about the size of the fund. As the Alexander Objectors previously illustrated in multiple filings, Class Counsel has attempted to extrapolate the size of the fund, upon which they seek a percentage fee, from guestimates about participation. *See* ECF No. 7354 and 7355 (The Alexander Objectors' Response in Opposition to the Fee Petition, along with the Declaration of Kenneth G. McCoin, Ph.d, C.F.A.); and ECF 7533 (The Alexander Objectors' Response and Objection to the Supplemental Evidence filed in Support of the Fee Petition, along with the Declaration of Jamshid Lofti, M.D.). The vast majority of Class Counsel's participation model rests upon a forecasted participation rate for Level 1.5 and Level 2 neurocognitive disorders – disorders

<sup>2</sup> The Alexander Objectors join in the request of Class Counsel The Locks Law Firm that the Court identify the matters upon which such court-appointed expert would testify. See ECF No. 8327 (Class Counsel The Locks Law Firm Response to Order to Show Cause Order and Request for Clarification and Extension of Time).

previously unknown in medicine because they are made up. And, if two successful claims in the first five months of operation is any indication of ultimate successful participation, Class Counsel may have wildly overestimated the “size of the fund” that will be paid out to NFL Players and their beneficiaries.

Finally, if Professor Rubenstein or another court-appointed expert is to merely opine on Class Counsel’s methodology on attorneys’ fee recovery, it is either a question of law for the Court or it is an advocate’s opinion and Class Counsel should be required to sponsor it. *See McCracken v. Ford Motor*, 392 Fed. Appx. 1, 3 (3 Cir. 2010) (noting that it is not the purpose of Rule 706 to provide litigation assistance).

## II.

The Court should not appoint Professor William B. Rubenstein to serve as an expert witness on attorneys’ fee in this case.

### A. **Professor Rubenstein has conflicts in this case.**

“[Rule 706] only allows a court to appoint a *neutral* expert.” *See Gorton v. Todd*, 793 F.Supp.2d 1171 (E.D. Cal. 2011) (citing *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 655 (7th Cir. 2002)) (emphasis added). Professor Rubenstein cannot serve as a neutral in this case because he has already served for advocates in this case.

Professor Rubenstein’s prior work on this litigation is reflected on the CV provided by the Court and his faculty disclosures for Harvard University. Specifically, on page 9 of the W.B. Rubenstein Resume attached to the Court August 23, 2017 order, Professor Rubenstein lists that he has “[p]rovided presentation on class certification issues in nationwide medical monitoring clas (*In re: National Football League Players’ Concussion Injury Litigation*, MDL. No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012)).

Inasmuch as this statement appears on Professor Rubenstein’s Resume under

the category for “Expert Consultant” and inasmuch as the Court has not previously appointed him as an expert consultant in this litigation, it would seem a fair inference that Professor Rubenstein has worked for a party in this case.

Meanwhile, Professor Rubenstein’s Faculty Disclosures in connection with his work for Harvard Law School discloses his work on *In re: National Football League Players’ Concussion Injury Litigation*, MDL No. 2323, Case No. 2-12-md-02323-AB, U.S. Dist. Ct., Eastern District of Pennsylvania as an “expert” for the client identified as: “Anapol Schwartz, PC for putative class of former NFL players.” See [http://www.law.harvard.edu/faculty/COI/2013\\_Rubenstein\\_William.html](http://www.law.harvard.edu/faculty/COI/2013_Rubenstein_William.html)

Finally, Professor Rubenstein makes other “blind” disclosures to Harvard Law School where he indicates expert consulting services on several class actions without disclosing which case or which party for whom he is consulting. See <https://helios.law.harvard.edu/Public/Faculty/ConflictOfInterestReport.aspx?id=10742>.

As such, Professor Rubenstein has conflicts that prevent him from being a neutral expert in this case. In the alternative, the Alexander Objectors agree with Class Counsel The Locks Law Firm that Professor Rubenstein should be required to make disclosures about his relationships with counsel seeking fees in this case. See ECF No. 8327 (Class Counsel The Locks Law Firm Response to Order to Show Cause Order and Request for Clarification and Extension of Time). The Alexander Objectors suggest that Professor Rubenstein should be required to disclose (a) his current relationships with each of the lawyers and law firms seeking attorney’s fees in this case; (b) all communications with anyone about this case; (c) all communications with each and every lawyer or law firm seeking attorney’s fees in this case; (d) any and all information and/or documents supplied to him or obtained by him regarding this case.

The failure of Professor Rubenstein to make such disclosures or the failure of the Court to require such may jeopardize the Court’s ability to continue on the case

should Professor Rubenstein be appointed, consult with the Court, and later be judicially determined to have a conflict of interest. Specifically, where a Rule 706 court-appointed expert is not neutral, such expert risks the neutrality of the Court. *See In re Kensington Intern. Ltd.*, 368 F.3d 289 (3d 2004) (holding that the bias of the Court-appointed experts on asbestos “irreversibly tainted” the district judge and that disqualification under 28 U.S.C. 455 was necessary). In *In re Kensington Intern. Ltd.*, as here, there is no assertion of wrongdoing; it is a matter of the appearance of neutrality. Professor Rubenstein does not have it and his conflict and bias places the Court in a difficult position.

**B. Professor Rubenstein has a bias on the central, disputed issues.**

A threshold dispute in this case is whether it is appropriate to use the percentage-of-the-fund method for awarding attorneys’ fees when there is no defined fund. That is, is percentage-of-the-recovery proper in a case such as this, where the fund is “uncapped” but is characterized by a reversionary-type interest (the NFL retains all sums not paid after a certain threshold) and, thus, the “size of the fund/recovery” is presently unknown and unknowable. Professor Rubenstein has already rendered an opinion on that question – in a vacuum. In his publication, *Class Action Attorney Fee Digest*, Professor Rubenstein reiterated an opinion from a case in which he testified as an expert: he testified that the “percentage of what” approach is reasonable notwithstanding the appearance of windfall because, “all things being equal, it seems more defensible that class attorneys receive the excess than that defendants do, as it is likely they will reinvest it in future consumer cases.” Rubenstein, William B., *Percentage of What*, *The Expert’s Corner*, *Class Action Attorney Fee Digest* (March 2007). He holds this opinion even though he knows that “it arguably sets up a conflict between counsel and the class by creating an incentive for counsel to accept a settlement unlikely to yield a high claims rate [ ] in exchange for being guaranteed a percentage of the fund made available, but not

claimed.” *Id.* Those class members objecting to Class Counsel’s attorneys’ fees methodology are prejudiced from the outset because Professor Rubenstein is not neutral on the percentage-of-the-fee methodology and is ambivalent about the resulting conflict between Class Counsel and the Class Members.

For these reasons, the Alexander Objectors urge the Court not to appoint an expert on attorneys’ fees because the issue is neither complex nor ripe for adjudication until a track record for claims processing is established giving more definition to the recover obtained. Even if the Court determines that a Rule 706 advisor is necessary on fees, the Alexander Objectors urge the Court to compel the putative expert to make disclosures about connections to the fee-seeking parties and, as is the case with Professor Rubenstein, to reject any expert with either a conflict or an issue bias. Finally, the Alexander Objectors respectfully reurge their pending request for discovery on Class Counsel attorney’s fees [ECF No. 7534] so that, whenever the issue becomes ripe, the Court may have data upon which to determine reasonable fees.

Date: August 31, 2017

Respectfully Submitted,

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Smith, James A. Young Sr., and Baldwin Malcom Frank

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of  
record via the Court's ECF system on August 31, 2017.

/s/ Lance H. Lubel

Lance H. Lubel



**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*  
  
Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,  
  
Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Civ. Action No. 14-00029-AB

**CO-LEAD CLASS COUNSEL'S RESPONSE TO "RESPECTFUL REQUEST"  
TO APPOINT THE MAGISTRATE JUDGE TO DETERMINE  
ALLOCATION OF COMMON BENEFIT FUND**

Co-Lead Class Counsel respectfully submit this brief response to the "respectful request" filed on August 31, 2017 by attorney Nicole V. DeVanon of the firm of Girardi Keese (ECF No. 8330) ("Request"), seeking appointment of Magistrate Judge Strawbridge to determine "proper allocation" of the common benefit fund. The Court should deny the Request.

The Request does not make clear on whose behalf it is filed. It is also not clear what the Request means in making the disjointed averment that "all of the parties to the litigation have relations." ECF No. 8330, at 1. Plainly, they do not.



At any rate, the Court should reject the Request for several reasons. *First*, it is well out of time. The briefing of the common benefit fee petition (ECF No. 7151) closed months ago. There is no explanation offered as why this “respectful request” is being made now.

*Second*, in its April 4, 2017 Order (ECF No. 7446), the Court already delineated the handling of fee issues, tasking Magistrate Judge Strawbridge with the preparation of a Report and Recommendation concerning the individual attorney petitions for assertions of liens, but reserving to itself the adjudication of “Co-Lead Class Counsel’s Petition for Award of Attorneys’ Fees (ECF No. 7151), any objections to that Petition, and all similar filings related to fees associated with the Settlement Class as a whole.” Stated simply, the Court has already spoken to the Request and stated that *it* will decide common benefit fee petition issues.

*Third*, the Request lacks a persuasive justification for the Court to undo its April 4th Order and turn every fee-related matter over to the Magistrate Judge. It states that “[a] lot of work has gone into the case before and after the class action approval,” and that “[i]t would be best if the person who is placed in charge of evaluating legal fee issues is familiar with the work done both before and after the class action was approved.” ECF No. 8330, at 1-2. This is unconvincing for two reasons. The first is that no firm is owed compensation out of the Attorneys’ Fees Qualified Settlement Fund merely because it performed work, irrespective of how much work it performed or how far back in time services were rendered. The salient question is whether any work inured to the *common benefit* of the Class. The second reason is that the Request offers no explanation as to why this Court should cede common benefit fee allocation responsibility to the Magistrate Judge. No one is more familiar with the entire history of this litigation and better suited to make allocation determinations as to common benefit work than this District Judge – who has presided

over and lived with this multidistrict litigation for well over five years now and thus is well acquainted with every twist and turn in it, and knows which firm did what.

To the extent that the Court directed the Magistrate Judge to address individual attorneys' lien petitions in the first instance, the reason for that distinct treatment should be fairly obvious. No one can be certain how much work individual attorneys or firms performed for individual Class Member clients to justify the percentage liens they claim. Consequently, there may be a need for separate factual development concerning some or many firms' asserted individual liens. It is simply misguided to lump together the adjudication of the common benefit fee and individual lien petitions.

For all these reasons, the Court should deny the Request.

Date: September 5, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on September 5, 2017.

/s/ Christopher A. Seeger  
Christopher A. Seeger

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Plaintiffs,

**Hon. Anita B. Brody**

Civ. Action No. 14-00029-AB

V.

National Football League and  
NFL Properties, LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**ORDER REGARDING PAYMENT OF ATTORNEYS' FEES AND EXPENSES  
FROM CLAIMS ON FUNDING REQUEST NO. 7 DATED AUGUST 10, 2017  
AND ON FUTURE FUNDING REQUESTS**

Pursuant to the Court’s continuing and exclusive jurisdiction under Article XXVII of the Amended Class Action Settlement Agreement filed on February 13, 2015 (the “Settlement Agreement”), and the May 8, 2015 Amended Final Approval Order and Judgment, **IT IS HEREBY ORDERED** as follows:

**1. *Defined Terms.*** The capitalized terms used in this Order that are defined in the Settlement Agreement have the same meanings given to them in the Settlement Agreement. Additional capitalized terms are defined in this Order.

**2. Relevant Settlement Agreement Provisions.** To ensure there are sufficient funds in the Monetary Award Fund to pay all final Monetary Awards, Derivative Claimant Awards,

and costs and expenses, Section 23.3(b)(i) of the Settlement Agreement requires the Claims Administrator to submit a monthly funding request to the Parties in this manner:

[O]n or before the 10th day of each month, the Claims Administrator shall provide in writing to the NFL Parties and Co-Lead Class Counsel a monthly funding request identifying the monetary amount necessary to pay all final and accrued Monetary Awards, Derivative Claimant Awards and the costs and expenses paid out of the Monetary Award Fund, . . . and any additional amount necessary to maintain the Monetary Award Fund targeted reserve, . . . after all final and accrued Monetary Awards, Derivative Claimant Awards and costs and expenses are paid.

Section 23.3(b)(iii) gives the Parties an opportunity to object to a funding request:

Within ten (10) days after receipt of the written monthly funding request, the NFL Parties and Co-Lead Class Counsel shall each notify the Claims Administrator in writing of any objection to any aspect of the funding request.

Section 23.3 (b)(iii)(1) sets the deadline by which the NFL will pay funds into the Monetary Award Fund:

[T]he NFL Parties will pay, or cause to be paid, the additional amounts beyond the undisputed portion of the monthly funding request within the longer of thirty (30) days of receiving the written monthly funding request or ten (10) days after resolution of the objection.

Section 23.3(b)(iv) sets the time within which the Claims Administrator will instruct the Trustee to pay Monetary Awards and Derivative Claimant Awards on a monthly funding request:

Within ten (10) days after transfer of funds into the Monetary Award Fund . . . , the Claims Administrator shall cause payment to be issued on all applicable final and accrued Monetary Awards, Derivative Claimant Awards and costs and expenses paid out of the Monetary Award Fund.

**3. *Scope of this Order.*** This Order applies to the Monetary Award payments and Derivative Award payments reflected in the Claims Administrator's Funding Request No. 7 dated August 10, 2017, and in future funding requests ("Covered Payments") and to the 15 attorneys or law firms representing Settlement Class Members identified in Funding Request No. 7 and to the attorneys or law firms representing Settlement Class Members identified in future funding requests ("Covered Attorneys") until further order of the Court.

**4. *Handling of Attorneys' Fees and Expenses Related to Monetary Awards on Funding Request No. 7 and Future Funding Requests.***

- (a) Within seven days after the date of this Order, the Covered Attorneys identified in Funding Request No. 7 shall provide the Claims Administrator with a statement of: (1) the Covered Attorney's contingency fee percentage applicable to any Covered Payment; (2) the amount of his or her expenses relating to any Covered Payment; (3) verification that such fees and expenses are reasonable; and (4) an executed certification pursuant to 28 U.S.C. §1746 that the information provided to the Claims Administrator is true and accurate.
- (b) Within 10 days after the date of a request from the Claims Administrator, the Covered Attorneys subject to future funding requests shall provide the Claims Administrator with a statement of the information required in Paragraph 4(a) of this Order.
- (c) For the Covered Payments subject to Funding Request No. 7 and future funding requests, the Claims Administrator shall withhold until further order of Court the fees and expenses applicable to each Covered Payment, as determined in accordance with the information provided under Paragraph 4(a) of this Order, or as modified by the Court, and distribute to the Covered Attorneys the remainder of the award payment due. Such Covered Attorneys shall ensure that the balance of each such Covered Payment is promptly paid to the applicable Settlement Class Member or for his benefit and may not deduct any fees and expenses from such balance.

**5. *Exclusive Retained Jurisdiction.*** This Court retains continuing and exclusive jurisdiction over the interpretation, implementation, and enforcement of this Order.

SO ORDERED this \_\_7<sup>TH</sup>\_\_ day of September, 2017.

**s/Anita B. Brody**

---

**Anita B. Brody**  
**United States District Court Judge**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

MDL No. 2323

No. 2:12-md-2323-AB

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and others  
similarly situated,*

**Hon. Anita B. Brody**

Plaintiffs,  
v.

Civ. Action No. 14-00029-AB

National Football League, et al.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**REPLY TO CO-LEAD CLASS COUNSEL’S RESPONSE TO “RESPECTFUL  
REQUEST” TO APPOINT THE MAGISTRATE JUDGE TO DETERMINE  
ALLOCATION OF COMMON BENEFIT FUND**

The undersigned counsel for over 600 class members respectfully submits this reply brief in response to of Co-Lead Class Counsel's opposition to having the Magistrate Judge determine the allocation of the Common Benefit Fund.

By history, the undersigned counsel instituted the lawsuits which ultimately were consolidated before this Honorable Court by the JPMDL. During the early stages of the litigation, the undersigned counsel was appointed as a member of the Executive Committee.

On or about February 21, 2011, a meeting was held for various law firms involved in the early stages of this litigation at the offices of co-lead counsel. Of significance, co-lead counsel hired William Rubenstein as an expert consultant for purposes of “Medical Monitoring/Class Action” for this litigation. (see Exhibit #1).

Now, this Honorable Court seeks to appoint Mr. Rubenstein as the expert to review and determine allocation of the Common Benefit Fund. The undersigned counsel respectfully objects to this appointment of Mr. Rubenstein due to an obvious conflict of interest.

Indeed, this Honorable Court has the authority to determine the outstanding Petition by Co-Lead Class Counsel for Common Benefit Fund allocation. However, in doing so, it would be highly prejudicial to appoint someone who is co-lead class counsel’s hired and paid expert consultant. Rather, the undersigned respectfully requests that this matter be assigned to the Magistrate Judge Strawbridge for further hearing on the appointment of Mr. Rubenstein as well as allocation of the Common Benefit Fund.

Dated: September 11, 2017

Respectfully Submitted:

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### **CERTIFICATE OF SERVICE**

I hereby certify that I have, this day, electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record on this 11th day of September 2017.

/s/ Nicole F. DeVanon  
Girardi | Keese

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

THIS DOCUMENT RELATES TO:  
  
ALL ACTIONS

**Hon. Anita B. Brody**

**ORDER FOR A DETAILED SUBMISSION ON LAWYERS' FEES**

**AND NOW**, this \_\_11TH\_\_ day of September, 2017, to assist this Court in determining the proper allocation and division of class counsel attorneys' fees, it is **ORDERED** that Co-Lead Class Counsel, Christopher A. Seeger, submit a detailed submission as a proposal for the allocation of lawyers' fees among class counsel including the precise amounts to be awarded along with a justification of those amounts based on an analysis of the work performed.

s/Anita B. Brody

\_\_\_\_\_  
ANITA B. BRODY, J.

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Copies **MAILED** on \_\_\_\_\_ to:

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2: 12-md-2323 (AB)

MDL No. 2323

-----  
**Kevin Turner and Shawn Wooden,**  
*on behalf of themselves and others similarly  
situated,*

Plaintiffs,

v.

National Football League, et al.,

Defendants.

Civil Action No.: 14-00029-AB

**THIS DOCUMENT RELATES TO:  
ALL ACTIONS**

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**CO-LEAD CLASS COUNSEL'S NOTICE TO THE COURT REGARDING RETAINING  
WILLIAM RUBESTEIN AS ADVISOR TO PLAINTIFF'S STEERING COMMITTEE**

This is to advise the Court that on February 7, 2012, I, Sol H. Weiss, retained William Rubenstein to work with and give advice to the Plaintiff's Steering Committee.

DATED: September 13, 2017

RESPECTFULLY SUBMITTED,

/s/ Sol H. Weiss

Sol H. Weiss, Esquire (I.D. 15925)

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***Co-Lead Class Counsel***

**CERTIFICATE OF SERVICE**

It is hereby certified that a true and correct copy of the foregoing was served on all counsel of record via the Court's ECF system on September 13, 2017.

/s/ Sol H. Weiss  
Sol H. Weiss, Esquire

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

THIS DOCUMENT RELATES TO:  
  
ALL ACTIONS

**Hon. Anita B. Brody**

**ORDER**

This case involves a variety of complex issues concerning attorney's fees. By Order dated August 23, 2017, the Court proposed to appoint an expert to assist it with consideration of these issues and specifically proposed appointing Professor William B. Rubenstein as that expert; that Order gave all parties an opportunity to show cause why the Court should not undertake these steps. Several parties have (1) asked for clarification of the expert's role; (2) argued against appointment of an expert or for delay in the appointment; (3) suggested alternative (or no) experts; and/or (4) raised questions about Professor Rubenstein's potential conflicts.<sup>1</sup> Having carefully considered those responses to the Order to Show Cause, the Court has decided to proceed with the appointment of Professor Rubenstein.

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<sup>1</sup> Professor Rubenstein's c.v. reflects a prior involvement in this matter, as noted in several filings made in response to the Court's order to show cause. *See* ECF No. 8350; 8364; 8372. In connection with this proposed appointment, Professor Rubenstein explained to the Court that the Anapol Weiss law firm paid him to attend and speak at a meeting of plaintiffs' lawyers – including those who did and did not end up on the PSC – that was held on February 21, 2012, but

Among others, three sets of fee issues now before the Court include the following: (1) in some MDL cases of similar structure, other federal courts have capped the percentage that any lawyer may receive from his or her client's recovery;<sup>2</sup> (2) Class Counsel in this case seeks a "set-aside" of 5% from each of the plaintiffs' recoveries "for the purpose of reimbursing counsel for future common benefit work and expenses in conjunction with implementation of the Settlement" (ECF No. 7151 at 2); and (3) Class Counsel has filed a motion seeking an award of \$112.5 million in attorney's fees and costs, which the NFL has agreed to pay in addition to the class's direct relief.

The Court has asked Professor Rubenstein to provide his expert opinion (1) on whether the Court has the authority to and should order a cap on the percentage that any class member in this case would be obligated to pay his attorney and if so, what that cap should be and how that cap should be implemented and (2) on the reasonableness of requiring class members to contribute a portion of their recoveries to a common benefit fund, whether 5% is an appropriate portion, and whether this process will result in any counsel being over-compensated (e.g., double-dipping); the Court itself will decide (3) the reasonableness of Class Counsel's request for \$112.5 million and has not asked Professor Rubenstein to address this request directly in his report.

The Court has asked Professor Rubenstein to endeavor to submit a written report on these issues no later than December 1, 2017. All parties will have an opportunity to respond to

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that he has had no involvement in the matter since that date. As noted below, the parties will, in due course, have an opportunity to pursue any concerns that Professor Rubenstein's attendance at this meeting biased his opinions.

<sup>2</sup> In re Vioxx Products Liability Litigation, 574 F. Supp. 2d 606, 607 (E.D. La. 2008), on reconsideration in part, 650 F. Supp. 2d 549 (E.D. La. 2009) (capping contingent fee arrangements for all plaintiffs' attorneys at 32% plus reasonable costs).

Professor Rubenstein's report in writing and, pursuant to the provisions of FRE 706(b)(2), any party may depose Professor Rubenstein about his opinion after his report is submitted. In responding to Professor Rubenstein's report, parties may raise concerns about how alleged conflicts render Professor Rubenstein's opinions unreliable and the Court will consider those arguments in that context.

Accordingly, **AND NOW**, this \_\_\_\_14<sup>th</sup> \_\_ day of September, 2017, pursuant to Federal Rule of Evidence 706, it is **ORDERED** that Professor William B. Rubenstein is appointed as an expert witness on attorneys' fees. Professor Rubenstein is entitled to reasonable compensation for his time, for the time of his research assistants, and for his costs, which, according to FRE 706(c), shall be paid by the parties as a cost in an amount to be determined by the Court.

s/Anita B. Brody

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ANITA B. BRODY, J.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN OF PENNSYLVANIA**

# IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION LITIGATION



**No. 12-md-2323 (AB)**

MDL No. 2323

**THIS DOCUMENT RELATES TO:  
ALL ACTIONS**

**First Supplement in Support of the Alexander Objector’s Objections to and in Opposition to Co-Lead Class Counsel’s Petition for an Award of Attorneys’ Fees Reimbursement of Costs and Expenses, Adoption of a set-Aside of Each Monetary Award and Derivative Claimant Award, and Case Contribution Awards for Class Representatives**

The Alexander Objectors file this their First Supplement in Support of their Objections to and Opposition to Co-Lead Class Counsel’s Petition for an Award of Attorneys’ Fees, Reimbursement of Costs and Expenses, Adoption of a Set-Aside of Each Monetary Award and Derivative Claimant Award, and Case Contribution Awards for Class Representatives [ECF 7151] as follows:

## A. SUMMARY

Two in seven months of claims processing. That is the number of former NFL Players' claims reported as approved in the latest (June 15, 2017) Joint Status Report. The number does not approach the numbers forecast and does not suggest the trajectory of claims to be paid that Co-Lead Class Counsel promised as a justification for its fee request. Even this modest passage of time proving (a) Co-Lead Class Counsel's demand for fees before the payment of a single claim was premature; (b) Co-Lead Class Counsel's assurance that its prognostications about the number of claims that would be approved is, so far, hollow; (c) Co-Lead Counsel will receive an unconscionable windfall if the fee petition is not delayed to establish

a reasonable track record of claims paid.

## **B. ARGUMENT**

1. On March 27, 2017, the Alexander Objectors filed their Objections to and their Opposition to Co-Lead Class Counsel’s Petition for an Award of Attorneys’ Fees, Reimbursement of Costs and Expenses, Adoption of a Set-Aside of Each Monetary Award and Derivative Claimant Award, and Case Contribution Awards for Class Representatives [ECF 7151]. *See* ECF 7354 and 7355.

2. The Alexander Objectors argued, in part, that Co-Lead Class Counsel’s methodology—constructive common fund—rests upon a guess about the potential participation and qualification of class members. The Alexander Objectors further pointed out that Co-Lead Class Counsel’s rush to submit its fee petition before a single NFL player is paid a dime is a departure from common benefit cases. *See, e.g., In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, 2:10-md-02179, ECF 21849 (October 28, 2016) (reflecting *Deepwater Horizon* counsel waited four years and until 9 billion in Settlement benefits were paid to present their common benefit fees). Therefore, the petition for fees is premature. *See* ECF 7355, pp. 6-10, 21- 27, 38 – 40.

3. Co-Lead Class Counsel then filed a reply—a seventy-five page document with thirteen additional exhibits—in an attempt to bolster its fee-petition evidence. ECF 7464.

4. The Alexander Objectors objected to the new evidence and submitted responsive evidence illustrating further the analytical gap in Co-Lead Class Counsel’s methodology attempting to quantify the size of the fund using “settlement definitions” of conditions not recognized in the medical community; improperly based upon data that is not analogous to the settlement diagnoses; and, thus, without a reliable basis predict how many Class Members will be approved with a “qualifying diagnosis” on the settlement categories. ECF 7533, pp. 1-6.

5. Claims processing began on March 23, 2017 and registration is now closed.

6. The Court received the most recent Joint Status Report on June 15, 2017. ECF 7827. As to registrations, the Parties disclosed that, as of June 5, 2017, 14,507 people submitted registration forms, including 12,082 Retired NFL Football Players, 546 Representative Claimants and 1,879 Derivative Claimants. *See id.*, p. 3. As to claims processed, the administrator has authorized payment of only two (2) out of the 869 total claims made. *See* ECF 7827-1, p. 9. More specifically, on May 26, 2017, the BAP Administrator authorized—subject to lien resolution and other holdbacks<sup>1</sup>—the first payment for a qualifying diagnosis: \$5 million for a diagnosis of ALS. *Id.* Then, on June 5, 2017, the BAP Administrator authorized, again subject to certain holdbacks, the second payment for a qualifying diagnosis: \$4 million for a diagnosis of CTE. *Id.* Thus, still not a dime paid according to this report.

7. When compared, for example, to the NFL data submitted to Special Master Golkin, the present track record—2 claims approved but no money paid—is wildly out of step with the 665 claims forecast to be ***paid*** in year 1 for a total of \$242 million dollars. *See* Report of NFL Parties submitted by Perry Golkin, submitted September 12, 2014, ECF 6168.

8. It is no wonder that the NFL Parties felt so comfortable agreeing to an **uncapped** fund, with a modest reserve, on unrecognized and thus unattainable settlement diagnosis criteria to most of the Class Members. And, it is no surprise that the NFL Parties created a **capped** fund for attorneys’ fees which Co-Lead Class

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<sup>1</sup> The report does not make entirely clear what “holdbacks” prevented the payment of these claims. However, in light of the use of the term “lien resolution” in conjunction with the term “holdback,” it is unlikely that the report is referencing the Settlement “holdbacks of Article IX or Article XI, as they are lien resolution holdbacks. Thus, it is possible – but unknowable to the Class Members – that the Claims Administrator is unilaterally holding back under Article XXI for future attorneys’ fees.

Counsel has attempted to exhaust with its first petition for fees, in advance of any Settlement distribution.

### C. CONCLUSION

Since June 15, the BAP Administrator has not filed any further status reports. Thus, in addition to the previously filed argument and evidence outlined above, the Alexander Objectors rely upon ECF 7827, the Joint Status Report, in support of their Objections to and their Opposition to Co-Lead Class Counsel's Petition for an Award of Attorneys' Fees, Reimbursement of Costs and Expenses, Adoption of a Set-Aside of Each Monetary Award and Derivative Claimant Award, and Case Contribution Awards for Class Representatives. The June 15, 2017 report is further evidence that Co-Lead Class Counsel's guess about the size of the fund is both premature and without reliable foundation. The Court should deny the fee petition without prejudice to be resubmitted after the Claims Administrator has established a track record of actual payments to these injured, former NFL Players and their families.

Date: September 20, 2017

Respectfully Submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on September 20, 2017.

/s/ Lance H. Lubel  
Lance H. Lubel

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN OF PENNSYLVANIA**

|                                                                               |                                                |                                                                             |
|-------------------------------------------------------------------------------|------------------------------------------------|-----------------------------------------------------------------------------|
| <b>IN RE: NATIONAL FOOTBALL<br/>LEAGUE PLAYERS’ CONCUSSION<br/>LITIGATION</b> | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | No. 12-md-2323 (AB)<br><br><br><br><br><br><br><br><br><br><br>MDL No. 2323 |
| <b>THIS DOCUMENT RELATES TO:<br/>ALL ACTIONS</b>                              |                                                |                                                                             |

**The Alexander Objector’s Motion to Compel  
Compliance with Case Management Order No. 5**

On September 11, 2017, the Court entered an Order (ECF No. 8367) directing Co-Lead Class Counsel to “submit a detailed submission as a proposal for the allocation of lawyers’ fees among class counsel including the precise amounts to be awarded along with a justification of those amounts based on an analysis of the work performed.” In tandem with the Court’s request for such data to assist “in determining the proper allocation and division of class counsel attorneys’ fees,” the Alexander Objectors<sup>1</sup> file this motion to compel compliance with CMO 5 (ECF 3710), the Court’s 2012 Order directing “all plaintiffs’ counsel ... who intend to seek attorneys’ fees or expense reimbursement” to maintain data in support of fees and expenses. For support, the Alexander Objector’s contemporaneously file their Memorandum in Support of The Alexander Objector’s Motion to Compel Compliance with Case Management Order No. 5.

For the reasons stated herein, and in the accompanying memorandum, the Court should compel, as mandated by CMO 5, the monthly and/or quarterly time

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<sup>1</sup> The “Alexander Objectors” include Settlement Class Members Melvin Aldridge, Trevor Cobb, Jerry W. Davis, Michael Dumas, Corris Ervin, Robert Evans, Anthony Guillory, Wilmer K. Hicks, Jr., Richard Johnson, Ryan McCoy, Emanuel McNeil, Robert Pollard, Frankie Smith, Tyrone Smith, James A. Young Sr., and Baldwin Malcom Frank.

and expense reports; the underlying Summary Time and Expense Report Forms; and any reports or audits prepared by or for Diane Brown, Dianne M. Nast, or Alan B. Winikur or the firm Zelnick, Mann and Winikur PC.

Date: September 20, 2017

Respectfully Submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on September 20, 2017.

/s/ Lance H. Lubel  
Lance H. Lubel

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Civ. Action No. 14-00029-AB

**CO-LEAD CLASS COUNSEL'S CONSOLIDATED MEMORANDUM  
(1) IN OPPOSITION TO THE ALEXANDER OBJECTORS' MOTION  
TO COMPEL COMPLIANCE WITH CMO5, AND (2) IN RESPONSE TO  
THEIR LATEST UNAUTHORIZED POST-BRIEFING SUPPLEMENTATION  
OF THEIR OBJECTIONS TO THE COMMON BENEFIT FEE PETITION**



## **I. INTRODUCTION AND ARGUMENT**

The Supreme Court, Third Circuit, and this Court have long cautioned that “[a] request for attorney’s fees should not result in a second major litigation.” *Fox v. Vice*, 563 U.S. 826, 838 (2011) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 726 F.3d 403, 406 (3d Cir. 2013); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 886 F. Supp. 445, 467 n.42 (E.D. Pa. 1995) (also warning that attorney’s fees applications should not “consume[ ] a disproportionate share of the court’s time”) (citation and internal quotation marks omitted). Indeed, disputes over attorneys’ fees are “one of the least socially productive types of litigation imaginable.” *Hensley*, 461 U.S. at 442 (Brennan, J., concurring in part and dissenting in part).

Oblivious to this longstanding admonition, after a four-month hiatus, the Alexander Objectors are back for an encore, taking more potshots at Co-Lead Class Counsel’s (“Class Counsel’s”) Fee Petition.<sup>1</sup> On September 20, 2017, they filed a deceptively-entitled “First Supplement” to their objections to the Fee Petition (ECF No. 8395) – which is actually their *third* attack on the Fee Petition since the April 10, 2017 close of briefing on it. (ECF No. 7464).<sup>2</sup> In it, the Alexander Objectors assert – based on a *three month-old* status report on implementation of

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<sup>1</sup> In the interest of brevity, “Fee Petition” is employed as shorthand to refer to the combined petition, filed on February 13, 2017, for an award of common benefit fees, reimbursement of common benefit expenses, incentive/case contribution/service awards to the three Class Representatives, and imposition of a 5% holdback or set-aside on Class Members’ monetary awards (ECF No. 7151).

<sup>2</sup> Besides their objections to the Fee Petition (ECF Nos. 7354, 7355), after the close of briefing, the Alexander Objectors filed an unsanctioned sur-reply “Response and Objection” to Class Counsel’s Fee Petition reply papers (ECF No. 7533), and a concurrent motion for leave to take discovery of Class Counsel (ECF No. 7533). Class Counsel moved to strike the former as unauthorized (in addition to addressing those post-briefing objections on the merits) and opposed the latter. ECF Nos. 7605, 7606.

the Settlement – that the approval of only two monetary award claims as of June 5, 2017 demonstrates that the Settlement’s value has been illusory all along. As with their April 21, 2017 sur-reply “Response and Objection” to Class Counsel’s reply papers (ECF No. 7533), the Alexander Objectors did not seek leave for this filing.

Just hours after filing this second unauthorized augmentation of their objections, the Alexander Objectors also fired a separate volley at the Fee Petition in the form of a motion to compel compliance with Case Management Order No. 5 (ECF No. 3710 [Sept. 11, 2012]) (“CMO5”) in which they request that the Court order Class Counsel to produce all quarterly time and expense reports and reports of audits performed since 2012 (ECF No. 8396).

Like their verbose and meritless (and in many respects inane) objections to the Fee Petition and earlier post-briefing submissions, neither of these filings has anything to commend it, let alone provides legitimate grounds for denying or even delaying the adjudication of the Fee Petition. The Court should reject both.

**A. The Court Should Deny the Motion to Compel Compliance with CMO5 Because It Is Untimely, Class Counsel Complied with CMO5, and, in Any Event, a Lodestar Cross-Check Does Not Entitle Objectors to Detailed Billing Information**

Taking their second filing first, the Alexander Objectors’ motion to compel is well out of time. The Alexander Objectors had ample opportunity to raise issues respecting alleged non-compliance with CMO5 in their Fee Petition objections – and, in fact, did. *See* ECF No 7355, at 22-23, 51, 54-57.<sup>3</sup> It is inappropriate for them to be initiating separate motion practice respecting CMO5 at this late date – *five months* after the close of briefing on the Fee Petition – when the Court has directed Class Counsel to submit a recommended fee allocation (ECF No. 8367). This latest filing is another rearguard assault, not unlike the Alexander Objectors’ post-briefing motion

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<sup>3</sup> Page references are to ECF pagination, not the pagination of the original document.

to take discovery of Class Counsel (ECF No 7534). The Court should not indulge this latest tactic in the unrelenting campaign being waged against the Fee Petition by a small band of diehard objectors and their counsel, who unsuccessfully battled the underlying Settlement with meritless attacks not only through final approval, but also in the Third Circuit – and whose only “contribution” to the Class has been endless quibbling, grouching, and carping. What Class Counsel stated before in response to these objectors’ prior post-briefing filings is worth repeating here: enough is enough.

Setting aside that this motion is untimely, its fundamental premise is flawed. The Alexander Objectors contend that Class Counsel “has failed to file” a single time and expense report and that, therefore, “the Court has no basis upon which to ensure Co-Lead Class Counsel did, in fact, efficiently prosecute this matter for the benefit of former-player plaintiffs without unnecessary duplication or undue costs or fees.” Mem. in Support of Mot. (ECF No. 8396-1) (“Mem.”) at 2. They ask the Court to direct the production of time and expense reports dating back to 2012, along with copies of the auditor’s reports of time and expense submissions. *Id.* at 8. Their request fails for two reasons.

*First*, Class Counsel collected time reports and, as stated in the memorandum in support of their motion to strike the Alexander Objectors’ unauthorized sur-reply, stand ready to provide the backup for claimed time and expenses *in camera*. ECF No. 7606, at 22.<sup>4</sup> There is no reason, however, to require the filing of five years’ worth of quarterly time and expense reports and reports of audits, which will only facilitate the Alexander Objectors’ filibustering agenda by providing them another target at which to nitpick. Contrary to the Alexander Objectors’ interpolation (Mem.

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<sup>4</sup> *In camera* review of billing records guards against privileged or confidential matters being divulged. *E.g.*, *Team Sys. Int’l, LLC v. Haozous*, No. 16-6277, 2017 WL 3616326, at \*3 (10th Cir. Aug. 23, 2017) (citing cases).

at 7), nothing in CMO5 contemplated the *public filing* of reports. The required “submission” of time and expense reports under CMO5 was to the individuals whom the Court designated (ECF No. 3710, at 7), not a filing on the Court’s docket. And for good reason. CMO5 was not adopted for the Alexander Objectors’ or any other objector’s benefit but, rather, for that of the Plaintiffs’ court-appointed leadership – so that time reports could be regularly received from firms performing common benefit work and periodically evaluated so that, down the road, Co-Lead Counsel (who subsequently were appointed as Co-Lead Class Counsel) would be in an informed position to base any combined fee application or recommended fee allocation.

*Second*, and perhaps more importantly, the Alexander Objectors have no legitimate need to pore over five years’ worth of quarterly time and expense and auditor’s reports. Their latest sideshow is simply another manifestation of their obdurate refusal to accept that this is a constructive common fund, not a fee-shifting, case, and a percentage-of-recovery analysis therefore applies. *See* ECF No. 7151-1, at 39-40 (citing cases); ECF No. 7464, at 19-20 (same). That being the case, a lodestar cross-check is not even mandatory in this Circuit. *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001) (courts “*may*, if necessary, utilize the lodestar cross-check”) (emphasis added); *Moore v. GMAC Mortg.*, No. 07-4296, 2014 WL 12538188, at \*2 (E.D. Pa. Sept. 19, 2014); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-MD-01871, 2012 WL 6923367, at \*9 (E.D. Pa. Oct. 19, 2012) (“an abridged lodestar cross-check might not be mandatory”); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 94 n.6 (D.N.J. 2001).

To the extent that a cross-check *is* undertaken, the Third Circuit has admonished that it “need entail neither mathematical precision nor bean-counting,” and that “[t]he district courts may rely on summaries submitted by the attorneys and need not review actual billing records.” *In re*

*Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005). Thus, a cross-check is “‘not a full-blown lodestar inquiry’ and a court ‘should be satisfied with a summary of the hours expended by all counsel at various stages with less detailed breakdown than would be required in a lodestar jurisdiction.’” *Id.* at 307 n.16 (quoting *Third Circuit Task Force Report*, 208 F.R.D. 340, 423 (2002)); accord *In re Cendant Corp. Litig.*, 264 F.3d at 285 (cross-check entails “an abbreviated calculation of the lodestar amount”) (emphasis added); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (“[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.”); ECF No. 7606, at 24-25 (citing additional cases).

For this reason, the Alexander Objectors are not entitled to production of detailed time records or auditor’s reports. See *In re Diet Drugs*, 582 F.3d 524, 539 (3d Cir. 2009) (rejecting objection that district court, which performed lodestar cross-check, “should have considered and made public Class Counsel’s individual billing records,” approving reliance on time summaries, and noting that consideration of individual billing records is a “time-consuming process”); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 342 (3d Cir. 1998) (where lodestar calculation was employed merely as cross-check, district court acted within its discretion in denying discovery of time records); see also *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012, at \*18 (N.D. Ohio Sept. 23, 2016) (objectors “ha[d] no right to see Class Counsel’s fee and expense records,” especially where “any such review by objectors would not affect the Court’s ultimate conclusion”).

Simply put, when it comes to the adjudication of an attorneys’ fees application, “[a] court need not, and indeed should not, become a green-eyeshade accountant[ ].” *Christian v. Honeywell Ret. Benefit Plan*, No. 13-4144, 2014 WL 1652222, at \*7 (E.D. Pa. Apr. 24, 2014) (citation and

internal quotation marks omitted). The hairsplitting scrutiny that the Alexander Objectors would like to perform by obtaining quarterly time reports and reports of audits – which will only result in needless prolongation of the fee proceedings as the Alexander Objectors follow up with yet more contrived or persnickety objections – is simply inconsistent with a “back-of-the-envelope” validation performed in a lodestar cross-check. There is particularly no need here for the kind of painstaking inspection of time records and auditor’s reports that the Alexander Objectors envision. Having closely overseen this litigation for more than five years now, the Court is well acquainted with the efforts of counsel performing common benefit work.<sup>5</sup>

In short, the Alexander Objectors have articulated no persuasive (let alone compelling) reason for this Court to order, at this late date, the filing of quarterly time and expense reports or of auditor’s reports stretching back five years. Accordingly, the Court should deny their motion.

**B. The Court Should Disregard or Overrule the Alexander Objectors’ “First Supplement” to Their Fee Petition Objections Because It Is Both Unauthorized and Untimely, and Relies on Out-of-Date Information**

As with their April 21, 2017 unauthorized sur-reply cloaked as a “Response and Objection” to Class Counsel’s Fee Petition reply papers (ECF No. 7533), the Alexander Objectors did not request leave to file their “First Supplement.” For this reason alone, the Court should disregard it.

At any rate, the Alexander Objectors’ additional objections are devoid of merit. The Alexander Objectors base their arguments on information contained in the June 15, 2017 joint

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<sup>5</sup> Suggesting that production of all quarterly time reports and reports of audits is needed because time has been improperly billed, the Alexander Objectors contend that Subclass Counsel Dianne Nast seeks compensation for services in contravention of CMO5’s directive that time spent preparing time and expense reports is not compensable. Mem. at 4 n.2; *see* CMO5 § I.C [ECF No. 3710, at 4]. That criticism is unfounded. Ms. Nast’s services related to her collecting and compiling time reports of all firms performing common benefit work, and were undertaken at the Court’s express direction. CMO5 § II [ECF No. 3710, at 7]. CMO5 precludes only *individual* attorneys from billing time spent preparing time reports as common benefit time.

status report (ECF No. 7827) filed by the Claims and BAP Administrators. *See* ECF No. 8395, at 3. Relying on the Claims Administrator’s statement in that report that two monetary awards (totaling \$9 million) had been approved as of June 5, 2017 (ECF No. 7827, at 4-5), the Alexander Objectors draw tenuous inferences that this confirms that the Settlement employed “unrecognized and thus unattainable settlement diagnosis criteria” and that the Settling Parties’ projections as to the value of the recovery on behalf of the Class were illusory, and thus that “it is no surprise” that Class Counsel seeks payment of fees “in advance of any Settlement distribution.” *Id.* at 3-4.

The question that begs to be asked, of course, is why the Alexander Objectors waited *more than three months* to raise this. The untimely presentation of this supplemental objection is a second independent reason to reject it. No matter, for the information from which they draw their shaky inferences – furnished barely four months after registration for Settlement benefits had opened – is stale. As of this date (October 4, 2017), a total of 20,367 registrations have been received, including 17,142 from Retired NFL Football Players and their Representatives. There has been an even greater increase in the monetary awards rendered. One hundred and four Notices of Monetary Awards have been issued to Class Members, representing \$154,103,567 in payments that have been or will be made, with \$67,802,846 in payments already made. Declaration of Orran L. Brown, Sr., dated Oct. 4, 2017 (filed contemporaneously herewith), at ¶ 3. Thus, like their earlier attempts to call into question the recovery achieved on behalf of the Class, *e.g.*, ECF Nos. 7355 (at 15-40), 7533 (at 1-6), the Alexander Objectors’ latest insinuation that Class Counsel has exaggerated the value of the class-wide recovery and their latest innuendo about Class Counsel’s motives fall flat.

## II. CONCLUSION

For the foregoing reasons, the Court should (i) deny the Alexander Objectors’ motion to compel compliance with CMO5 (ECF No. 8396), and (ii) disregard or overrule the “First Supplement” to their objections to Class Counsel’s Fee Petition (ECF No. 8395).

Date: October 4, 2017

Respectfully submitted,

/s/ Christopher A. Seeger

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on October 4, 2017.

/s/ Christopher A. Seeger  
Christopher A. Seeger

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Civ. Action No. 14-00029-AB

Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**DECLARATION OF CHRISTOPHER A. SEEGER IN SUPPORT OF  
PROPOSED ALLOCATION OF COMMON BENEFIT ATTORNEYS' FEES,  
PAYMENT OF COMMON BENEFIT EXPENSES, AND  
PAYMENT OF CASE CONTRIBUTION AWARDS TO CLASS REPRESENTATIVES**

Christopher A. Seeger declares, pursuant to 28 U.S.C. § 1746, based upon his personal knowledge, information and belief, the following:

1. I am fully familiar with the matters set forth herein, including the procedural history of this litigation and the class-wide settlement that this Court approved. I submit this Declaration pursuant to the Court's September 12, 2017 Order directing me to submit a detailed proposal for the allocation of lawyers' fees among common benefit counsel, including the

precise amounts to be awarded [ECF No. 8367] and in support of the payment of common benefit expenses and case contribution awards for the class representatives from the Attorneys' Fees Qualified Settlement Fund ("QSF") established under the Settlement Agreement for the payment of common benefit fees and expenses. *See* Settlement Agreement §§ 21.2, 23.7.

### **Overview**

2. I was appointed by the Court in *In re National Football League Players' Concussion Injury Litigation*, MDL No. 2323 (E.D. Pa.) on April 25, 2012, to serve as Plaintiffs' Co-Lead Counsel, and as a member of the Plaintiffs' Executive Committee ("PEC") [ECF No. 64]. I was the principal negotiator and architect of the Class Action Settlement dated June 25, 2014, between the Plaintiff Class and the Defendants National Football League and NFL Properties LLC (collectively, the "NFL Parties") [ECF No. 6073-2], which was preliminarily approved on July 7, 2014 [ECF No. 6084, ¶ 3(b)], amended as of February 13, 2015 [ECF No. 6481-1], and finally approved on April 22, 2015 [ECF No. 6510] (the "Settlement"). With these approvals of the Settlement, I was first appointed to serve and then confirmed in my role as Co-Lead Class Counsel.
3. As Co-Lead Counsel and Co-Lead Class Counsel, I was personally responsible for and involved in every aspect of the litigation and eventual Settlement. I have already detailed my assessment of the contributions that I and my firm have provided to the Settlement, as well as the overall contributions by Class Counsel, members of the PEC and Plaintiffs' Steering Committee ("PSC"), and other counsel for Plaintiffs who worked at my direction and for the common benefit of the Settlement Class in my Declaration in Support of Co-Lead Class Counsel's Petition for an Award of Attorneys' Fees, Reimbursement of Costs

and Expenses, Adoption of a Set-Aside of Five Percent of Each Monetary Award and Derivative Claimant Award, and Case Contribution Awards for Class Representatives [ECF No. 7151-2], the supporting Memorandum [ECF No. 7151-1] (“Fee Brief”) and my Supplemental Declaration in further support [ECF No. 7464-1].

4. I provide my recommendations herein, as the Court requested, recognizing that the Court will make the final determination as to the aggregate award and allocations.
5. In Part I of this Declaration, I provide my assessment of each of the firms who submitted declarations in support of the Petition for an Award of Attorney’s Fees (“Fee Petition”) in terms of their relative contributions in bringing about this historic settlement and defending it through appeals. Based on my assessment of the relative value of each of the firms’ contributions, I propose a multiplier to the final adjusted lodestar submitted by each firm in support of the Fee Petition. The distribution and allocation proposals described herein assume distribution of the full attorneys’ fee and expense fund provided under the Settlement Agreement, together with the available supplemental funds described below. In Part II of this Declaration, I provide an accounting of the lodestar and expenses for Class Counsel who have worked on the implementation of the Settlement since the Fee Petition was filed.
6. With regard to Part II, the work summarized and reflected therein is almost exclusively related to the implementation and oversight of the Settlement Program, which will continue to deliver benefits throughout its 65-year term. I believe that the work reflected in Part II

(post-Settlement work) should be paid from the 5 percent set-aside requested in Section IV.E of the Fee Brief, should the Court so order.<sup>1</sup>

7. Finally, before turning to my allocation recommendations, I explain the total amount of funds available for the award of common benefit fees and expenses, and case contribution awards to the class representatives (“Available Funds”) so that, assuming the Court awards the full amount of the Available Funds, I can propose the payment to be made to each firm and class representative.

***The Available Funds for the Payment of Fees and Case Contribution Awards***

8. Pursuant to the Settlement Agreement and the March 7, 2017 Order of the Court [ECF No. 7246], the Parties established the QSF into which the NFL Parties deposited \$112,500,000. This fund and any accruing interest are being held by the Trustee of that fund until an order directing payment is made by the Court. As of September 30, 2017, the balance of this fund is \$112,838,602.08, which reflects both the accrual of interest on the balance and the payment of costs and fees related to the establishment and maintenance of the QSF.
9. In addition to the QSF, the Settlement Agreement provided for the payment by the NFL Parties of \$4 million to Co-Lead Class Counsel for the “Settlement Class Notice Payment.” Settlement Agreement § 14.1(b). This fund was available to pay for the Settlement Class Notice, the Settlement Class Supplemental Notice, and other related expenses incurred by Co-Lead Class Counsel. *See* Settlement Agreement §§ 23.1(d) and 23.3(e). Co-Lead Class Counsel kept these funds in escrow, making payments as expenses were incurred in connection with the various notice programs undertaken to notify the Settlement Class

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<sup>1</sup> Expenses incurred following submission of the Fee Petition in connection with securing and implementing the Settlement are proposed for reimbursement from the Available Funds.

11. From the Available Funds, I propose that the expenses incurred to date first be reimbursed.

The Fee Petition includes a request for reimbursement of \$5,682,779.38 in common benefit expenses. Since the filing of the Fee Petition, an additional \$488,775.63 in expenses have been incurred, including \$471,291.50 incurred by my firm. Thus, the total expenses submitted for reimbursement by the Court—pre- and post-Fee Petition—are \$6,171,555.01.

***PART I: Assessment of the Contributions of Each Firm, as Submitted in Connection with the Fee Petition***

JA7947

only time and expenses that could properly be considered to be for the common benefit were included with the Fee Petition. If we questioned any time or expense in this review process, we allowed the firm who made the submission to explain, for my firm's further consideration, the benefit realized for the Settlement Class, or to simply withdraw the item. The time and expenses presented by the declarations of each of the firms in support of the Fee Petition reflect the final determination of the common benefit lodestar and expenses. The firm declarations submitted with the Fee Petition were prepared by each of these firms and reflect their assessment of their contributions. This initial review made no assessment of the relative value of the time and expenses to the overall benefit to the Settlement Class.

14. I have now undertaken review of the relative value of the contributions made by each of the firms to bring the eventual benefits of the Settlement to the Settlement Class. The factors I considered in making this overall assessment included:

- Roles in leadership, including Court-appointed Leadership Positions, such as Co-Lead Counsel, Co-Lead Class Counsel, Class Counsel, Subclass Counsel, membership on PEC and PSC, and Liaison Positions;
- The point at which a firm's claimed common benefit contributions were made (i.e., were they involved in the earliest stages of a project, or were they brought in mid-way to help on particularized issues); and
- Contributions to the Settlement, including, most importantly, early settlement discussions, formal settlement negotiations and mediations, approvals of the Settlement Agreement, and defense of the Settlement through the attempted appeal to the Supreme Court.

15. Having reviewed the time submitted by each of the firms and their supporting declarations,<sup>2</sup> and considering the value of their contributions to realizing the benefits for the Settlement Class, I provide a summary for each of the firms as follows:

- a. **Anapol Weiss**: Sol H. Weiss of Anapol Weiss was appointed to the PEC and was later appointed to serve as Co-Lead Counsel and then Co-Lead Class Counsel by the Court. Mr. Weiss' partner Larry E. Coben served as a member of the PEC. Mr. Weiss contributed to the organization of the PSC and PEC and the establishment of some of the PSC committees. After undertaking varying leadership responsibilities early in the litigation, he attended many of the settlement meetings and mediations with the NFL. Mr. Weiss, and his partner, Mr. Coben, assisted in negotiating the battery of tests for the BAP and dealt with other matters relating to the medical issues underpinning the Settlement. Mr. Weiss was active in the settlement process, including review and comment on the drafts of the Settlement Agreement. Messrs. Weiss and Coben met with and assisted in preparing scientists and physicians who submitted declarations in support of the Settlement. Mr. Weiss continued his service to the Settlement after his appointment as Co-Lead Class Counsel. Anapol Weiss submitted 4,241.20 hours for a lodestar of \$1,857,436.00 and reported \$1,031,971.55 in common benefit expenses.
- b. **Casey Gerry Schenk**: David Casey was appointed to serve on the PSC and served, with the assistance of his partner Fred Schenk, on the Communications Committee. Casey Gerry Schenk submitted 417.40 hours for a lodestar of \$333,920.00 and reported \$86,651.72 in common benefit expenses.
- c. **Dugan Law Firm**: James Dugan was appointed to the PSC and served on the Discovery and Preemption Committees. The Dugan Law Firm submitted 293.90 hours for a lodestar of \$188,340.50 and reported \$118,880.16 in common benefit expenses.
- d. **Girard Gibbs LLP**: Daniel Girard and Amanda Steiner worked with Co-Lead Counsel, experts, and co-counsel to obtain Final Approval of the Settlement and assisted in the defense of the Settlement Agreement after Final Approval. Girard Gibbs submitted 373.10 hours for a lodestar of \$279,489.00 and reported \$8,300.11 in common benefit expenses.

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<sup>2</sup> Additional details about the work each firm submitted as part of the common benefit are included in the firm declarations submitted as part of my Declaration in support of the Fee Petition. See ECF Nos. 7151-06 to 7151-26.



- e. **Girardi Keese**: Thomas V. Girardi was appointed to the PEC. Girardi Keese, along with Goldberg, Persky & White, P.C., was involved in certain early cases that preceded the formation of this MDL. This firm submitted 628.70 hours for a lodestar of \$448,190.00<sup>3</sup> and reported \$5,509.15 in common benefit expenses.
- f. **Goldberg, Persky & White**: Goldberg, Persky & White was involved in certain early cases that preceded the formation of this MDL. At the direction of Co-Lead Counsel, Jason Luckasevic worked in conjunction with PEC member, Thomas Girardi, and his law firm of Girardi Keese. Goldberg, Persky & White submitted 500.60 hours for a lodestar of \$262,860.00 and reported \$11,823.78 in common benefit expenses.
- g. **Hagen, Roskopf & Earle**: Bruce Hagen served on the Communications Committee of the PSC. Hagen, Roskopf & Earle submitted 540.80 hours for a lodestar of \$324,480.00 and reported \$16,998.08 in common benefit expenses.
- h. **Hausfeld**: Hausfeld partners, Richard Lewis and Michael D. Hausfeld, were appointed to serve as members of the PEC. Mr. Lewis served on the Legal Committee of the PSC. In that role, Mr. Lewis conducted factual and legal research in preparation for, and drafting of, the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints, and opposing the NFL's efforts to dismiss the plaintiffs' claims.

In addition, Hausfeld associate, Jeannine M. Kenney, served as the Court-appointed Plaintiffs' Liaison Counsel, and assisted Co-Lead Counsel in organizing communications with and between the PEC, the PSC and Co-Lead Counsel. Hausfeld submitted 1,281.80 hours for a lodestar of \$763,917.50 and reported \$165,468.47 in common benefit expenses.

- i. **Herman Herman & Katz**: Herman Herman & Katz conducted, at the direction of Co-Lead Counsel, focused research and assessment on medical issues relating to brain injuries. Herman Herman & Katz submitted 136.30 hours for a lodestar of \$89,660.00.
- j. **Prof. Samuel Issacharoff**: Professor Issacharoff, whose expertise in appellate advocacy and knowledge of class action jurisprudence proved invaluable to the

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<sup>3</sup> After review of the hourly rates submitted by each of the lawyers that reported time for the Fee Petition, I made an adjustment to Mr. Girardi's hourly rate because it was much higher than the rates reported by other, comparable attorneys. This lodestar reflects my use of an hourly rate of \$990.00 per hour rather than the \$1,100.00 per hour that was initially submitted.

Class, was consulted early in the settlement negotiations on Rule 23 issues. He became active publicly during the briefing and oral argument of the Fed. R. Civ. P. 23(f) attempted appeal to the Third Circuit. He was an instrumental part of the team that prepared the Settlement for Final Approval, including the response to the objections to the Settlement. Along with Seeger Weiss, he was intimately involved with the briefing before the Third Circuit and the U.S. Supreme Court and was effectively co-lead counsel with regard to appellate issues, briefing and strategy. Professor Issacharoff submitted 801.75 hours for a lodestar of \$800,512.50 and reported \$7,302.22 in common benefit expenses.

- k. **Kreindler & Kreindler**: Anthony Tarricone was appointed to serve as a member of the PEC and co-chaired the Communications Committee with Steve Marks (of Podhurst Orseck). Working closely with Co-Lead Counsel and his co-chair, Mr. Tarricone helped develop an effective media campaign to ensure the dissemination of accurate information to interested media, and counter misinformation concerning the Settlement to potential class members. Kreindler & Kreindler submitted 1,573.00 hours for a lodestar of \$1,258,400.00 and reported \$120,832.04 in common benefit expenses.
- l. **Levin Sedran & Berman**: Arnold Levin was appointed to serve as a member of the PSC and later was appointed Subclass Counsel for Subclass 1. His firm, Levin Sedran & Berman (LSB), assisted with research on a number of topics relevant to the strength and viability of plaintiffs' claims, including medical monitoring, tolling, preemption, and fraudulent concealment, while assisting in the preparation of the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints.

Mr. Levin was asked by Co-Lead Counsel to assist in the negotiations after they were already underway. These negotiations included the class and subclass definitions, a preliminary injury grid, and foundation for the Baseline Assessment Program.

Thereafter, Mr. Levin participated in settlement negotiations with the NFL Parties as counsel for a proposed subclass of retired players who were not diagnosed with injuries associated with concussive and sub-concussive head trauma. At the direction of Co-Lead Counsel, LSB partners, Sandra L. Duggan and Mr. Levin, assisted with the continuing settlement negotiations and coordinated with Dianne Nast, Subclass Counsel for Subclass 2.

LSB continued its support of the Settlement, and assisted Co-Lead Counsel on preliminary settlement approval and class certification, final approval, as well as Rule 23(f) appeals and arguments to the Third Circuit. This firm submitted 4,862.75 hours for a lodestar of \$4,573,438.75<sup>4</sup> and reported \$519,893.97 in common benefit expenses.

- m. **Locks Law Firm**: Gene Locks and David Langfitt of the Locks Law Firm (LLF) were appointed to serve as members of the PEC and Mr. Locks was later appointed to serve as Class Counsel in the Settlement.

Mr. Langfitt researched and drafted, along with two other PEC members, the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints, and was involved in preparing the opposition to the NFL's motion to dismiss on the grounds of preemption.

Thereafter, LLF made contributions toward the negotiation of the Settlement. The Locks Law Firm submitted 4,243.00 hours for a lodestar of \$3,084,500.00 and reported \$639,160.00 in common benefit expenses.

- n. **McCorvey Law**: Derriel McCorvey was appointed to serve as a member of the PSC and was active on the Communications Committee. McCorvey Law submitted 331.30 hours for a lodestar of \$198,780.00 and reported \$104,155.65 in common benefit expenses.
- o. **Mitnick Law**: Mitnick Law served at the direction of Co-Lead Counsel in the multi-faceted outreach efforts to the Retired NFL Player Community, including in-person events with alumni and other NFL players' associations, which became increasingly important after the Settlement had received Preliminary Approval. Mitnick Law submitted 1,198.15 hours for a lodestar of \$898,612.50 and reported \$83,082.20 in common benefit expenses.
- p. **NastLaw**: Dianne Nast was appointed to serve as a member of the PSC and was later appointed to serve as Subclass Counsel for Subclass 2. Her firm, NastLaw, was actively involved from the outset of the litigation, including preparation for, and drafting of, the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints and opposing the NFL's efforts to dismiss the plaintiffs' claims. Thereafter, Ms. Nast participated in settlement negotiations with the NFL

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<sup>4</sup> After review of the hourly rates submitted by each of the lawyers that reported time for the Fee Petition, I made an adjustment to the hourly rates of Mr. Levin, Ms. Dugan and Mr. Longer because they were notably higher than the rates reported by other, comparable attorneys. This lodestar reflects my use of a lower hourly rate than was originally reported for these three lawyers.

Parties as counsel for a proposed subclass of retired players who were diagnosed with injuries associated with concussive and sub-concussive head trauma. NastLaw remained active in defending the Settlement once it received Preliminary Approval. Nast Law submitted 1,211.75 hours for a lodestar of \$765,060.25 and reported \$117,138.64 in common benefit expenses.

- q. **Podhurst Orseck**: Stephen Marks and Ricardo M. Martinez-Cid of Podhurst Orseck were appointed to the PEC. Mr. Marks also served as co-chair of the Communications and Ethics Committees and was later appointed to serve as Class Counsel. Mr. Martinez-Cid also served as co-chair of the Discovery and Document Repository Committee. Additionally, Stephen F. Rosenthal served as one of the co-chairs of the Legal Committee, where he was involved in such matters as the drafting of the Master Administrative Personal Injury and Medical Monitoring Class Action Complaints and opposition to the NFL's efforts to dismiss the plaintiffs' claims.

Mr. Marks was involved in the settlement negotiations, including in early face-to-face negotiations with the NFL Parties, and continued to provide substantial support for the Settlement through Final Approval. His ongoing engagement included interfacing with the two clients of Podhurst Orseck who served as Class Representatives. Podhurst Orseck submitted 4,510.80 hours for a lodestar of \$3,005,744.50 and reported \$771,127.79 in common benefit expenses.

- r. **Pope McGlamry**: Mike McGlamry was appointed to serve as a member of the PSC and served as co-chair of the Discovery Committee on which his partner, M.J. Blakely, also served. He also served on the Communications Committee and on the Ethics Committee. Finally, Trip Tomlinson and Kimberly J. Johnson, both Pope McGlamry shareholders, served on the Legal Committee. Pope McGlamry submitted 1,274.90 hours for a lodestar of \$829,030.00 and reported \$125,137.01 in common benefit expenses.
- s. **Rheinhardt Wendorf & Blanchfield**: Garrett Blanchfield, a partner at the firm, served on the Third Party Discovery Issues Committee and the Privilege Committee. Rheinhardt Wendorf & Blanchfield submitted 23.10 hours for a lodestar of \$14,899.50 and reported \$1,480.57 in common benefit expenses.
- t. **Rose, Klein & Marias**: David Rosen was appointed to serve as a member of the PSC, and served as an active member of the Communications Committee and as chair of the Workers' Compensation Sub-Committee. He also served on the Lien

and Ethics Sub-Committees. Rose, Klein & Marias submitted 243.03 hours for a lodestar of \$157,969.50 and reported \$112,168.64 in common benefit expenses.

- u. **Seeger Weiss**: My partner, David Buchanan, and I were appointed to the PEC, and I was appointed to serve as Co-Lead Counsel and later as Co-Lead Class Counsel by the Court. As a result of the appointments of leadership given to me from the outset of the litigation, Seeger Weiss was actively involved in every aspect of this litigation. We led the development of the legal and scientific issues that drove the litigation toward settlement. Once settlement discussions began, Mr. Buchanan and I led every session of negotiations with the NFL and led every meeting of plaintiffs' counsel who assisted us in the development of the Settlement Agreement. After establishing the basic structure for the settlement, including the monetary award grid, contours for the Baseline Assessment Program, and the use of sub-classing to ensure that the Settlement comported with the strictures of Rule 23, we led the extensive negotiations of the final Settlement Agreement. After we successfully argued for Preliminary and Final Approval of the Settlement, including the negotiation of amendments to the Settlement Agreement, my firm took the lead in defending the Settlement on appeals which lasted over a year and ended only when the Supreme Court denied *certiorari*. After Final Approval, my firm took a similar lead on the implementation of the Settlement which became effective on January 7, 2017. My firm submitted 21,044 hours for a lodestar of \$18,124,869.10 and reported \$1,498,690.99 in common benefit expenses.
- v. **The Brad Sohn Law Firm**: Brad Sohn assisted the Ethics Committee on various matters. This Brad Sohn Law Firm submitted 50.00 hours for a lodestar of \$26,250.00.
- w. **Spector Roseman Kodroff & Willis**: Spector Roseman Kodroff & Willis partner, William Caldes, served on the Third Party Discovery Issues Committee and the Discovery/Document Repository Committee. Spector Roseman submitted 74.40 hours for a lodestar of \$51,708.00 and reported \$1,460.92 in common benefit expenses.
- x. **Zimmerman Reed**: Charles Zimmerman was appointed to serve as a member of the PSC and served on the Ethics Committee. Zimmerman Reed submitted 1,106.50 hours for a lodestar of \$885,907.25 and reported \$135,545.72 in common benefit expenses.

16. In addition to the firms that submitted common benefit submissions and whose declarations were submitted in support of the Fee Petition, I propose allocations to two sets of firms who represented objectors to the Settlement. My assessment of each of these firms is as follows:

- a. **MoloLamken/Hangle Aronchick Segal Pudlin & Schiller**: MoloLamken and Hangle Aronchick Segal Pudlin & Schiller represented the Faneca Objectors over the course of their challenges in this Court and thereafter on appeal. Their efforts did not yield any benefit for the Settlement Class certified by the Court. However, the firms served as Court-appointed liaisons for the objector groups and complied with the Court's request [ECF No. 6344] to coordinate the presentation of objections at the November 19, 2014 Fairness Hearing. In that capacity, these firms engaged in extensive communications with the various groups of represented objectors – both by phone and email – to achieve the orderly and effective presentation of issues at the Fairness Hearing. I am proposing that these firms share \$150,000.00 for this service to the Court.
  - b. **Corboy & Demetrio**: While this firm represented some of the initial objectors to the Settlement Agreement, and their objections did not ultimately yield any benefit for the Settlement Class certified by the Court, this firm ultimately came to support the efforts of Co-Lead Counsel to ensure that the Court's Final Approval of the Settlement would remain intact notwithstanding the continuing efforts of other objectors to undo the Settlement. Co-Lead Counsel relied on this firm's efforts during the appeals process to bring lingering objectors into the substantial fold of Retired Players and their families who supported the Settlement. I am proposing \$250,000.00 to this firm for its work supporting and defending the Settlement.
17. Based on the above assessments, my intimate knowledge of the work done in this case and the value this work had to the resulting Settlement Program, my review of the time submitted in support of the Fee Petition by each of the aforementioned firms, and my consultations with Brian T. Fitzpatrick, I propose the following allocations, including the multipliers of the lodestars initially submitted, among the firms:

| <b>Firm</b>                          | <b>Lodestar</b> | <b>Multiplier</b> | <b>Total</b>            |
|--------------------------------------|-----------------|-------------------|-------------------------|
| Anapol Weiss                         | \$1,857,436.00  | 2.5               | \$4,643,590.00          |
| Casey Gerry Schenk                   | \$333,920.00    | 1                 | \$333,920.00            |
| Dugan Law Firm                       | \$188,340.50    | 1                 | \$188,340.50            |
| Girard Gibbs                         | \$279,489.00    | 1.25              | \$349,361.25            |
| Girardi Keese                        | \$448,190.00    | 1                 | \$448,190.00            |
| Goldberg Perksy                      | \$262,860.00    | 1                 | \$262,860.00            |
| Hagens, Roskopf & Earl               | \$324,480.00    | 1                 | \$324,480.00            |
| Hausfeld                             | \$763,917.50    | 1.3               | \$993,092.75            |
| Herman Herman & Katz                 | \$89,660.00     | 1                 | \$89,660.00             |
| Prof. Issacharoff                    | \$800,512.50    | 3.55              | \$2,841,819.38          |
| Kreindler & Kreindler                | \$1,258,400.00  | 1.25              | \$1,573,000.00          |
| Levin Sedran & Berman                | \$4,573,438.75  | 2.25              | \$10,290,237.19         |
| Locks Law Firm                       | \$3,084,500.00  | 1.25              | \$3,855,625.00          |
| McCorvey Law                         | \$198,780.00    | 1                 | \$198,780.00            |
| Mitnik Law                           | \$898,612.50    | 0.75              | \$673,959.38            |
| NastLaw                              | \$765,060.25    | 1.5               | \$1,147,590.38          |
| Podhurst Orseck                      | \$3,005,744.50  | 2.25              | \$6,762,925.13          |
| Pope McGlamry                        | \$829,030.00    | 1                 | \$829,030.00            |
| Rheinhardt Wendorf                   | \$14,899.50     | 0.75              | \$11,174.63             |
| Rose, Klein & Mariais                | \$157,969.50    | 1                 | \$157,969.50            |
| Seeger Weiss                         | \$18,124,869.10 | 3.885             | \$70,415,116.45         |
| Brad Sohn Law Firm                   | \$26,250.00     | 0.75              | \$19,687.50             |
| Spector Roseman                      | \$51,708.00     | 0.75              | \$38,781.00             |
| Zimmerman Reed                       | \$885,907.25    | 1                 | \$885,907.25            |
| MoloLamkin/Hangle                    | \$150,000.00    | n/a               | \$150,000.00            |
| Corboy & Demetrio                    | \$250,000.00    | n/a               | \$250,000.00            |
| <b>Total Fee Petition Allocation</b> |                 |                   | <b>\$107,735,097.27</b> |

18. As discussed at greater length in the accompanying Declaration of Brian T. Fitzpatrick, this allocation is reasonable and well within the precedent set by fee allocations in other Multi-District Litigation Settlements.

***PART II: Continuing Work by Class Counsel***

19. As I explained in my earlier Supplemental Declaration in Support of the Fee Petition, work dedicated to the common benefit of the Settlement Class Members did not end on the date that the Fee Petition was filed. Indeed, after January 7, 2017, when the opportunity for any



further appeals by objectors passed and the Settlement became Effective, the work increased substantially as registration launched, the Claims Process opened, and the BAP began. While my firm is contributing the majority of the professional time on Plaintiffs' side toward implementing the Settlement, certain Class Counsel have also been involved when needed.

20. Below is a short summary of the work that has been and continues to be undertaken by my firm and Class Counsel:

- a. Work to Ensure Class Member-Friendly Registration and Claims Processes:  
Seeger Weiss dedicated hundreds of hours to the negotiation and development of the registration forms and procedures to ensure that the process was efficient and accessible so that no eligible Class Member would be denied entry into the Settlement Program. Seeger Weiss undertook substantial efforts to drive registration, including appearances by me at many NFL Alumni and annual NFL events across the country, hosting live webinar sessions and countless interviews by local and national media outlets, and responding to hundreds of calls from Retired NFL Football Players and their families.

Seeger Weiss worked with the Claims Administrator to continually update the Settlement Website, including its "Frequently Asked Questions" section, so as to ensure that Class Members have easy access to the most up-to-date information and clear guidance on the Settlement Program. Seeger Weiss also worked on revisions to the Settlement Website as new phases began, and additional forms and other documents were prepared for Class Members, such as those relating to the BAP Program and the appeals process.

Moreover, Seeger Weiss worked with counsel for the NFL Parties, the Administrators, and the Special Masters to ensure that all forms needed to submit a claim were prepared, and that they were all-inclusive and easily understood. Additionally, Seeger Weiss worked with the Claims Administrator, the NFL Parties, and the Special Masters to launch the on-line claims portal, which guides Class Members through the claims submission process. Seeger Weiss continues to respond to hundreds of calls each month from Retired NFL Football Players and their families about the Settlement and its Claims Process. In addition, Class Counsel provided input on many of the forms used in Claims Process and Settlement Program.



Seeger Weiss is constantly monitoring the progress of the Settlement Program's Claims Process in order to introduce improvements where possible to ensure that all eligible claims are paid and every Settlement Class Member receives any needed guidance.

- b. Selection of Appeals Advisory Panel Members and Appeals Advisory Panel Consultants: Seeger Weiss worked tirelessly for months so that the April 7, 2017 deadline for the recommendation of neurologists and neuropsychologists to serve as Appeals Advisory Panel ("AAP") members and consultants ("AAPC") was met. That process included identifying and interviewing potential candidates, and working with counsel for the NFL until the parties agreed on the recommendations. Class Counsel provided their input on the review of the candidates for these two bodies. As the Court is aware, these medical providers have begun reviewing certain claims where the diagnoses were made prior to the Effective Date in order to determine whether they are satisfactory Qualifying Diagnoses under the Settlement. In some instances, they will resolve disputes between BAP Providers as to the existence (or not) of a Qualifying Diagnosis. Working with the Claims Administrator and the NFL Parties, Seeger Weiss has undertaken ongoing efforts to ensure that these Court-appointed medical professionals have a complete understanding of their responsibilities in the Settlement Program, including, most importantly, their review of the Claim Packages for pre-Effective Date Qualifying Diagnoses.
- c. Selection and Orientation of Hundreds of Individuals to Serve as Qualified BAP Providers and Qualified MAF Physicians and Maintenance of These Physician Networks: The time-consuming vetting process associated with the selection of Qualified BAP Providers and Qualified MAF Physicians included a detailed review of each provider's CV and application, as well as in-depth internet searches to ensure the qualifications of each candidate. Seeger Weiss has been engaged in this effort on virtually a daily basis since the Effective Date, and Seeger Weiss and the other relevant parties expect to continue to recruit and contract with additional physicians and providers going forward. These were daunting tasks, but they were successfully accomplished prior to the initial launch of the MAF Physician network and preliminary establishment of the BAP Provider network in June of 2017. Class Counsel participated in the review and selection of physicians for these two networks.

Working with the BAP Administrator, the Claims Administrator, the NFL Parties and its own experts, Seeger Weiss developed the services agreement that each physician and provider will need to sign to serve in the networks. Through this same process, the parties prepared the manuals that are being and will be used by

each of the administrators to train the physicians and providers on the medical aspects of the Settlement, including the testing regimen at the heart of the BAP Program and what constitutes a Qualifying Diagnosis for purposes of qualifying for Monetary Awards.

Moreover, Seeger Weiss will be actively monitoring and reviewing these networks to make certain that Retired NFL Football Players are receiving the care and services that they deserve under the Settlement.

- d. Oversight of the Claim Process and Monetary Award Determinations: Now that the Claims Process has begun and Monetary Award determinations are being issued, Seeger Weiss, as Co-Lead Class Counsel is actively monitoring the Claims Process to ensure that the Settlement Class Members are receiving the benefits that were negotiated on their behalf. This oversight includes on-going reporting and requests for information from the Claims Administrator and reviewing every determination by a member of the AAP to ensure that the panel is correctly following the terms of the Settlement Agreement. When issues arise regarding the AAP's application of the Settlement Agreement, Seeger Weiss raises those issues with the Claims Administrator and the NFL, and the parties negotiate the language of a guidance memorandum to be sent to the AAP on that particular issue.

Additionally, Seeger Weiss continues to protect the interests of the Class Members by monitoring the wider operation of the Settlement Program and addressing, with the Claims Administrator, all types of issues as they arise.

- e. Appeals of Claims Determinations: Seeger Weiss has, and will continue, to monitor all Monetary Award determinations to provide guidance to Settlement Class Members, assess whether Co-Lead Class Counsel should appeal any of the adverse determinations or in those cases where an appeal from a determination is taken, either by a Class Member or the NFL Parties, to assess whether Co-Lead Class Counsel should file a statement regarding the appeal. Through this active engagement, Seeger Weiss is ensuring that the Settlement Program provides the benefits to the Settlement Class as intended.
- f. BAP Examinations: Development of the BAP network was only the first step in implementing the BAP benefits for eligible Retired NFL Football Players. Seeger Weiss is monitoring the implementation of the BAP so that examinations can be promptly scheduled and all appropriate medical standards are followed for the Retired NFL Football Players.
- g. Fielding Calls from Class Members and Lawyers Representing Class Members: In addition to all of the above, Seeger Weiss receives and responds to hundreds of

telephone calls each month from Class Members and lawyers representing Class Members. The calls involve virtually every conceivable issue regarding the Settlement. Of note, in the weeks leading up to the August 7, 2017 registration deadline, Seeger Weiss was deluged with telephone calls from Class Members (and even non-Class Members) and counsel representing Class Members with questions concerning the registration process. Seeger Weiss handled every call and was able to assist numerous Class Members in successfully registering under the Settlement. Seeger Weiss is providing the same level of support for Class Members through the Claims Process. Class Counsel also receive calls from Class Members' counsel and Class Members who are not represented by individual counsel.

Seeger Weiss also handled calls from Class Members and their family members concerning the potentially misleading solicitations and deceptive practices in the wake of the issuance of the Notice designed to clear up confusion disseminated in accordance with the Court's June 12, 2017 Order, and the Court's Notice & Order of July 19, 2017, setting the hearing for September 19, 2017 to address deceptive practices. Seeger Weiss expects that these calls will continue as the ongoing investigation develops.

- h. Efforts to Combat the Dissemination of Misinformation to Class Members and Other Forms of Exploitation of Class Members: Seeger Weiss began its investigation into misleading solicitations and improper practices in early 2017. As Co-Lead Counsel, Seeger Weiss was particularly concerned that profiteers might confuse or unduly influence Class Members, who may be more susceptible to deceptive tactics by reason of neurocognitive impairments, other ailments, age, financial distress, or some combination of all of these factors.

As directed by the Court's July 19, 2017 Order, Seeger Weiss directed discovery at three dozen separate groups of funders, claims service providers, fellow Retired NFL Football Players, and law firms. Seeger Weiss propounded written discovery requests, met and conferred with respondents' counsel, received and reviewed documents and information, conducted depositions, and filed motions to compel against those persons and entities refusing to comply with the discovery requests. Several of these entities have mounted a spirited defense against these efforts. Seeger Weiss presented its findings to the Court at the hearing held on September 19, 2017. Additionally, Seeger Weiss created and provided to the Court a spreadsheet identifying all of the Class Members who will purportedly owe portions of their potential future Monetary Awards to one or more of these factions.

Seeger Weiss is continuing to seek discovery from additional entities and will continue to pursue motion practice against those who are resisting compliance with the Court's Order. These efforts will likely continue into the future for some time,

both in the investigative aspect, and, should the Court fashion a remedy for these Class Members, in the enforcement and/or effectuation of that remedy.

Other efforts underway with respect to third parties involve briefing on the issue of whether the Settlement Agreement prohibits putative assignments of Class Members' monetary awards. This issue has broad ramifications for the Class inasmuch as several lenders have packaged loan advances to Class Members as assignments in order to disguise the high interest rates charged.

21. I requested that Class Counsel advise me as to time they spent on tasks that they believed were undertaken at my direction and for the common benefit of the Settlement Class since they reported their time in conjunction with the Fee Petition. Having reviewed that time, I report the following lodestar to the Court for information only:

| <b>Class Counsel</b>  | <b>Hours</b>  | <b>Lodestar</b>       |
|-----------------------|---------------|-----------------------|
| Anapol Weiss          | 89.4          | \$66,074.00           |
| Levin Sedran & Berman | 66.2          | \$64,767.50           |
| Locks Law Firm        | 316.9         | \$250,800.00          |
| NastLaw               | 68.0          | \$44,606.50           |
| Podhurst Orseck       | 279.5         | \$165,886.50          |
| Seeger Weiss          | 6010.0        | \$4,100,280.00        |
| <b>TOTAL</b>          | <b>6830.0</b> | <b>\$4,692,414.50</b> |

At this juncture, Class Counsel are not seeking an award related to this lodestar. Rather, I suggest that this work be compensated out of the 5% set-aside that was requested with the Fee Petition.

22. In addition to this lodestar, Class Counsel incurred an additional \$488,775.63 in common benefit expenses as of the end of September. As mentioned above, I request reimbursement of these expenses at this time from the Available Funds.

***Class Representative Case Contribution Awards***

23. I request that the Court also award \$100,000.00 to each of the three Class Representatives (their families in the cases of Corey Swinson and Kevin Turner, who are deceased) for their

contributions to this case. Awards of upwards of \$100,000 have been deemed appropriate in so-called “megafund” cases such as this. *See, e.g., In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG)(VVP), 2015 WL 5918273, at \*5-\*6 (E.D.N.Y. Oct. 9, 2015)(awarding six class representatives \$90,000 each in connection with 23 settlements totaling over \$900 million); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at \*17-\*18 (N.D. Ca. Sept. 2, 2015) (awarding one class representative \$140,000 and four others \$100,000 each, out of \$415 million settlement); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, Case No. 07-CV-1078, Dkt. 713 at 2, 8 (E.D. Pa. July 14, 2014) (approving \$130 million class action settlement, including service award of \$150,000 to one class representative and service awards of \$75,000 to two other class representatives); *In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318(RDB), 2013 WL 6577029, at \*1 (D. Md. Dec. 13, 2013) (awarding \$125,000 to lead class representative out of \$163.5 million settlement); *Velez v. Novartis Pharm. Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852, at \*4, \*8, \*28 (S.D.N.Y. Nov. 30, 2010) (awarding \$125,000 to named plaintiffs from \$175 million settlement).

## Conclusion

24. In summary, I respectfully request that the Court direct me to pay \$114,206,652.28 in the aggregate for common benefit work and expenses, and for the \$300,000 case contribution awards to the Class Representatives.

25. I further propose for the Court's consideration that the payment of expenses and case contribution awards, and allocation of fees between the firms be made as reflected in the attached exhibit.

26. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of October, 2017.

/s/ Christopher A. Seeger

CHRISTOPHER A. SEEGER  
Co-Lead Class Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing and supporting documents were served on all counsel of record via the Court's ECF system on October 10, 2017.

/s/Christopher A. Seeger

Christopher A. Seeger

# Exhibit



### Support of Proposed Allocation

#### AVAILABLE FUNDS

|                              |                         |
|------------------------------|-------------------------|
| QSF Fund                     | \$112,838,602.08        |
| Escrow Account               | \$1,368,050.20          |
| <b>TOTAL AVAILABLE FUNDS</b> | <b>\$114,206,652.28</b> |

#### EXPENSES

|                              |                       |
|------------------------------|-----------------------|
| Expenses - Fee Petition      | \$5,682,779.38        |
| Expenses - Post-Fee Petition | \$488,775.63          |
| <b>TOTAL EXPENSES</b>        | <b>\$6,171,555.01</b> |

#### PART I PROPOSED ALLOCATION

| <u>Firm</u>                                     | <u>Lodestar</u> | <u>Multiplier</u> | <u>Total</u>            |
|-------------------------------------------------|-----------------|-------------------|-------------------------|
| Anapol Weiss                                    | \$1,857,436.00  | 2.5               | \$4,643,590.00          |
| Casey Gerry Schenk                              | \$333,920.00    | 1                 | \$333,920.00            |
| Dugan Law Firm                                  | \$188,340.50    | 1                 | \$188,340.50            |
| Girard Gibbs                                    | \$279,489.00    | 1.25              | \$349,361.25            |
| Girardi Keese                                   | \$448,190.00    | 1                 | \$448,190.00            |
| Goldberg Perksy                                 | \$262,860.00    | 1                 | \$262,860.00            |
| Hagens, Roskopf & Earl                          | \$324,480.00    | 1                 | \$324,480.00            |
| Hausfeld                                        | \$763,917.50    | 1.3               | \$993,092.75            |
| Herman Herman & Katz                            | \$89,660.00     | 1                 | \$89,660.00             |
| Prof. Issacharoff                               | \$800,512.50    | 3.55              | \$2,841,819.38          |
| Kreindler & Kreindler                           | \$1,258,400.00  | 1.25              | \$1,573,000.00          |
| Levin Sedran & Berman                           | \$4,573,438.75  | 2.25              | \$10,290,237.19         |
| Locks Law Firm                                  | \$3,084,500.00  | 1.25              | \$3,855,625.00          |
| McCorvey Law                                    | \$198,780.00    | 1                 | \$198,780.00            |
| Mitnik Law                                      | \$898,612.50    | 0.75              | \$673,959.38            |
| NastLaw                                         | \$765,060.25    | 1.5               | \$1,147,590.38          |
| Podhurst Orseck                                 | \$3,005,744.50  | 2.25              | \$6,762,925.13          |
| Pope McGlamry                                   | \$829,030.00    | 1                 | \$829,030.00            |
| Rheinhardt Wendorf                              | \$14,899.50     | 0.75              | \$11,174.63             |
| Rose, Klein & Mariais                           | \$157,969.50    | 1                 | \$157,969.50            |
| Seeger Weiss                                    | \$18,124,869.10 | 3.885             | \$70,415,116.45         |
| Brad Sohn                                       | \$26,250.00     | 0.75              | \$19,687.50             |
| Spector Roseman                                 | \$51,708.00     | 0.75              | \$38,781.00             |
| Zimmerman Reed                                  | \$885,907.25    | 1                 | \$885,907.25            |
| MoloLamkin/Hangley                              | \$150,000.00    |                   | \$150,000.00            |
| Corboy & Demetrio                               | \$250,000.00    |                   | \$250,000.00            |
| <b>Total Lodestar - Fee Petition Allocation</b> |                 |                   | <b>\$107,735,097.27</b> |

|                                                     |                     |
|-----------------------------------------------------|---------------------|
| <b>Contribution Awards to Class Representatives</b> | <b>\$300,000.00</b> |
|-----------------------------------------------------|---------------------|

|                                        |                         |
|----------------------------------------|-------------------------|
| <b>TOTAL FEES, EXPENSES and AWARDS</b> | <b>\$114,206,652.28</b> |
| <b>TOTAL AVAILABLE FUNDS</b>           | <b>\$114,206,652.28</b> |

#### PART II LODESTAR

|                                           |                       |
|-------------------------------------------|-----------------------|
| Anapol Weiss                              | \$66,074.00           |
| Levin Sedran & Berman                     | \$64,767.50           |
| Locks Law Firm                            | \$250,800.00          |
| NastLaw                                   | \$44,606.50           |
| Podhurst Orseck                           | \$165,886.50          |
| Seeger Weiss                              | \$4,100,280.00        |
| <b>Total Lodestar - Post-Fee Petition</b> | <b>\$4,692,414.50</b> |

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

*In re National Football League Players' Concussion Injury Litigation*

*No. 2:12-md-02323-AB*

**DECLARATION OF BRIAN T. FITZPATRICK**

1. My name is Brian Fitzpatrick and I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the Supreme Court of the United States. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1.

2. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses at Vanderbilt. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the Arizona Law Review, and the NYU Journal of Law & Business. My work has been cited by numerous courts, scholars, and popular media outlets, such as the New York Times, USA Today, and Wall Street Journal. I am also frequently invited to speak at symposia and other events about class action litigation, such as the ABA National Institute on Class Actions in 2011, 2016, and 2017, and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute.

3. Lead class counsel in this case has proposed an allocation of any fee awarded among the various firms that worked on the case, and he has asked me to opine on whether the allocation is reasonable. For the reasons I state below, it is my opinion that the allocation is reasonable. In preparing this declaration, I conferred with lead class counsel and reviewed the declarations by the various firms that worked on this case.

4. In deciding how to allocate fees among multiple firms that have worked on behalf of a class, courts have taken a variety of approaches. Some courts do the allocation themselves. *See, e.g., Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1222-39 (S.D. Fla., 2006). Others appoint special masters to recommend an allocation. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1365900, at \*7-\*14 (N.D. Cal. April 3, 2013). But most courts delegate the responsibility to lead class counsel with review only for abuse of discretion. *See, e.g., Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 88 (2d Cir. 2010); *In re Initial Public Offering Securities Litigation*, 2011 WL 2732563, at \*1 (S.D.N.Y. Jul. 8, 2011); *In re Vitamins Antitrust Litigation*, 398 F.Supp.2d 209, 221-222 (D.D.C. 2005) (Facciola, Magistrate J.).

5. No matter who the allocator—court, special master, lead class counsel—the methodology used has tended to be the same: the allocation is based on the relative contribution made by each firm. *See Victor*, 623 F.3d at 88; *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1365900, at \*9; *In re Initial Public Offering Securities Litigation*, 2011 WL 2732563, at \*7 (“District courts routinely give lead counsel the initial responsibility of devising a fee allocation proposal ‘as they deem appropriate, based on their assessments of class counsel’s relative contributions.’” (quoting *In re Vitamins Antitrust Litigation*, 398 F.Supp.2d at 224)); *Allapattah Services*, 454 F.Supp.2d at 1227 (“[A]n allocation of fees should be based on the

relative contributions that each law firm provided to the Class.”). This relative contribution is usually determined by starting with each firm’s lodestar and then adjusting it based on a number of factors. *See Victor*, 623 F.3d at 88 (“[E]xamination of the lodestar is both relevant and useful.”); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1365900, at \*9 (recounting that special master “applied multipliers to the adjusted lodestar figures based on certain factors”); *In re Initial Public Offering Securities Litigation*, 2011 WL 2732563, at \*4 (approving allocation based on “requested lodestars, as well as the roles assumed, contributions made, time and labor expended, magnitude and complexity of assignments executed, relative risks undertaken, and quality of work performed”); *In re Vitamins Antitrust Litigation*, 398 F.Supp.2d at 228.

6. Lead class counsel in this case proposes to follow a similar methodology. In particular, lead class counsel determined the relative contribution made by each firm by starting with each firm’s lodestar and then adjusting it based on three factors: 1) the extent to which the firm took on leadership roles in the litigation, 2) how early the firm was meaningfully involved in the litigation, and 3) whether the firm was involved in settlement negotiations or helped defend the settlement once it was consummated—which, lead class counsel told me, were the two most important activities in this litigation. Lead class counsel then allocated the fee award he has sought from the Court to each firm in proportion to its adjusted lodestar. This methodology is reasonable and has been used in other cases.

7. First, lead class counsel adjusted each firm’s lodestar based on the extent the firm took on leadership roles in the litigation. In particular, lead class counsel protected the firms appointed to the PEC or PSC with multipliers of at least one and further adjusted upward the lodestars of the firms who served in special capacities, such as Co-lead Counsel, Class Counsel

or Subclass Counsel.<sup>1</sup> These adjustments are reasonable and supported by other cases. *See, e.g., In re Vitamins Antitrust Litigation*, 398 F.Supp.2d at 228 (approving multipliers based on “the [leadership] tier to which the firm belonged”); *In re Initial Public Offering Securities Litigation*, 2011 WL 2732563, at \*4 (approving multipliers based on “whether attorneys from the firm were assigned supervisory responsibilities or other leadership roles”).

8. Second, lead class counsel adjusted each firm’s lodestar based on how early each firm became meaningfully involved in the litigation. In particular, lead class counsel adjusted upward the lodestars of the firms that made contributions from the outset of the litigation all the way to its end.<sup>2</sup> Likewise, lead class counsel adjusted downward the lodestars of the firms that performed only discrete tasks here and there.<sup>3</sup> These adjustments are reasonable and supported by other cases. *See, e.g., In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 6909680, at \*3 (N.D. Cal. Oct. 24, 2016) (recommending multipliers based on whether firms “joined the case prior to early settlements or class certification” or whether they “joined later”).

9. Third, lead class counsel adjusted upward the lodestars of the firms that worked directly on settlement negotiations or supported the settlement on appeal or otherwise once it was consummated. In lead class counsel’s view, these were the most important activities in this litigation.<sup>4</sup> These adjustments are reasonable and supported by other cases. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1365900, at \*9 (approving adjustments based on “performing higher-skill tasks”); *In re Initial Public Offering Securities Litigation*, 2011 WL

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<sup>1</sup> These firms included most notably Anapol Weiss, Levin Sedran & Berman, Locks Law Firm, Nastlaw, Podhurst Orseck, and Seeger Weiss.

<sup>2</sup> These firms included most notably Anapol Weiss, Hausfeld, Levin Sedran & Berman, NastLaw, Podhurst Orseck, and Seeger Weiss.

<sup>3</sup> These firms included Mitnik Law Offices, Reinhardt Wendrof, Spector Roseman, and the Law Offices of Brad Sohn.

<sup>4</sup> These firms included most notably Anapol Weiss, Levin Sedran & Berman, Podhurst Orseck, Samuel Issacharoff, and Seeger Weiss.



## Appendix 1

**BRIAN T. FITZPATRICK**

Vanderbilt University Law School  
131 21st Avenue South  
Nashville, TN 37203  
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brian.fitzpatrick@law.vanderbilt.edu

**ACADEMIC APPOINTMENTS**

**VANDERBILT UNIVERSITY LAW SCHOOL**, *Professor*, 2012-present

- *FedEx Research Professor*, 2014-15; *Associate Professor*, 2010-12; *Assistant Professor*, 2007-10
- Classes: Civil Procedure, Federal Courts, Complex Litigation
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

**EDUCATION**

**HARVARD LAW SCHOOL**, J.D., *magna cum laude*, 2000

- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

**UNIVERSITY OF NOTRE DAME**, B.S., Chemical Engineering, *summa cum laude*, 1997

- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

**CLERKSHIPS**

**HON. ANTONIN SCALIA**, Supreme Court of the United States, 2001-2002

**HON. DIARMUID O'SCANNLAIN**, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

**EXPERIENCE**

**NEW YORK UNIVERSITY SCHOOL OF LAW**, Feb. 2006 to June 2007

*John M. Olin Fellow*

**HON. JOHN CORNYN**, United States Senate, July 2005 to Jan. 2006

*Special Counsel for Supreme Court Nominations*

**SIDLEY AUSTIN LLP**, Washington, DC, 2002 to 2005

*Litigation Associate*



## ACADEMIC ARTICLES

*An Empirical Look at Compensation in Consumer Class Actions*, 11 NYU J. L. & BUS. 767 (2015) (with Robert Gilbert)

*The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015)

*The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839 (2012)

*Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012)

*An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811 (2010) (selected for the 2009 Conference on Empirical Legal Studies)

*Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010)

*Originalism and Summary Judgment*, 71 OHIO ST. L.J. 919 (2010)

*The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (selected for the 2009 Stanford-Yale Junior Faculty Forum)

*The Politics of Merit Selection*, 74 MISSOURI L. REV. 675 (2009)

*Errors, Omissions, and the Tennessee Plan*, 39 U. MEMPHIS L. REV. 85 (2008)

*Election by Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2008)

*Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & LAW 277 (2007)

## BOOK CHAPTERS

*Civil Procedure in the Roberts Court* in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, 2016)

*Is the Future of Affirmative Action Race Neutral?* in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Ellen Katz & Samuel Bagenstos, eds., Michigan University Press, 2016)

## ACADEMIC PRESENTATIONS

*The Next Steps for Discovery Reform: Requester Pays*, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

*Private Attorney General: Good or Bad?*, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

*Liberty, Judicial Independence, and Judicial Power*, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

*The Economics of Objecting for All the Right Reasons*, 14th Annual Consumer Class Action Symposium, Tampa, Florida (Nov. 9, 2014)

*Compensation in Consumer Class Actions: Data and Reform*, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, New York (Nov. 7, 2014)

*The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?*, Northern District of California Judicial Conference, Napa, California (Apr. 13, 2014) (panelist)

*The End of Class Actions?*, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, Florida (Apr. 4, 2014)

*Should Third-Party Litigation Financing Come to Class Actions?*, University of Missouri School of Law (Mar. 7, 2014)

*Should Third-Party Litigation Financing Come to Class Actions?*, George Mason Law School (Mar. 6, 2014)

*Should Third-Party Litigation Financing Come to Class Actions?*, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law (Nov. 7-8, 2013)

*Is the Future of Affirmative Action Race Neutral?*, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School (Oct. 11, 2013)

*The Mass Tort Bankruptcy: A Pre-History*, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School (Sep. 28, 2013) (panelist)

*Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions*, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, Florida (Apr. 12, 2013) (panelist)

*The End of Class Actions?*, Symposium on Class Action Reform, University of Michigan Law School (Mar. 16, 2013)

*Toward a More Lawyer-Centric Class Action?*, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School (Nov. 30, 2012)

*The Problem: AT & T as It Is Unfolding*, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School (Apr. 26, 2012) (panelist)



*The Politics of Merit Selection*, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School (Feb. 27, 2009)

*The End of Objector Blackmail?*, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law (Oct. 9, 2008)

*Alternatives To Affirmative Action After The Michigan Civil Rights Initiative*, University of Michigan School of Law (Apr. 3, 2007) (panelist)

## OTHER PUBLICATIONS

*Lessons from Tennessee Supreme Court Retention Election*, THE TENNESSEAN (Aug. 20, 2014)

*Public Needs Voice in Judicial Process*, THE TENNESSEAN (June 28, 2013)

*Did the Supreme Court Just Kill the Class Action?*, THE QUARTERLY JOURNAL (April 2012)

*Let General Assembly Confirm Judicial Selections*, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

*"Tennessee Plan" Needs Revisions*, THE TENNESSEAN (Feb. 3, 2012)

*How Does Your State Select Its Judges?*, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

*On the Merits of Merit Selection*, THE ADVOCATE 67 (Winter 2010)

*Supreme Court Case Could End Class Action Suits*, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

*Kagan is an Intellect Capable of Serving Court*, THE TENNESSEAN (Jun. 13, 2010)

*Confirmation “Kabuki” Does No Justice*, POLITICO (July 20, 2009)

*Selection by Governor may be Best Judicial Option*, THE TENNESSEAN (Apr. 27, 2009)

*Verdict on Tennessee Plan May Require a Jury*, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

*Tennessee's Plan to Appoint Judges Takes Power Away from the Public*, THE TENNESSEAN (Mar. 14, 2008)

*Process of Picking Judges Broken*, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

*Disorder in the Court*, LOS ANGELES TIMES (Jul. 11, 2007)

*Scalia's Mistake*, NATIONAL LAW JOURNAL (Apr. 24, 2006)

*GM Backs Its Bottom Line*, DETROIT FREE PRESS (Mar. 19, 2003)

*Good for GM, Bad for Racial Fairness*, LOS ANGELES TIMES (Mar. 18, 2003)

*10 Percent Fraud*, WASHINGTON TIMES (Nov. 15, 2002)

## OTHER PRESENTATIONS

*The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding*, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

*Hedge Funds + Lawsuits = A Good Idea?*, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

*Judicial Selection in Historical and National Perspective*, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

*The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions*, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

*Life as a Supreme Court Law Clerk and Views on the Health Care Debate*, Exchange Club of Nashville (Apr. 3, 2012)

*The Tennessee Judicial Selection Process—Shaping Our Future*, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

*Reexamining the Class Action Practice*, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

*Judicial Selection in Kansas*, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

*Judicial Selection and the Tennessee Constitution*, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

*What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?*, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

*Judicial Selection in Tennessee*, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

*Ethical Implications of Tennessee's Judicial Selection Process*, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

## PROFESSIONAL ASSOCIATIONS

Referee, Journal of Empirical Legal Studies  
Reviewer, Oxford University Press  
Reviewer, Supreme Court Economic Review  
Member, American Law Institute  
Member, American Bar Association  
Fellow, American Bar Foundation  
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights, 2009-2015  
Board of Directors, Tennessee Stonewall Bar Association  
American Swiss Foundation Young Leaders' Conference, 2012  
Bar Admission, District of Columbia

## **COMMUNITY ACTIVITIES**

Board of Directors, Nashville Ballet; Nashville Talking Library for the Blind, 2008-2009

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

THIS DOCUMENT RELATES TO:  
  
ALL ACTIONS

**Hon. Anita B. Brody**

**ORDER**

**AND NOW**, this \_\_11<sup>TH</sup>\_\_ day of October, 2017, it is **ORDERED** that any counter-declaration in response to the Declaration of Christopher A. Seeger in Support of Proposed Allocation of Common Benefit Attorneys' Fees, Payment of Common Benefit Expenses, and Payment of Case Contribution Awards to Class Representatives (ECF No. 8447) must be submitted **on or before October 27, 2017**.

s/Anita B. Brody

\_\_\_\_\_  
ANITA B. BRODY, J.

Copies **VIA ECF** on \_\_\_\_\_ to:

Copies **MAILED** on \_\_\_\_\_ to:

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN OF PENNSYLVANIA**

|                                                                               |                                                |                                                                             |
|-------------------------------------------------------------------------------|------------------------------------------------|-----------------------------------------------------------------------------|
| <b>IN RE: NATIONAL FOOTBALL<br/>LEAGUE PLAYERS' CONCUSSION<br/>LITIGATION</b> | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | No. 12-md-2323 (AB)<br><br><br><br><br><br><br><br><br><br><br>MDL No. 2323 |
|-------------------------------------------------------------------------------|------------------------------------------------|-----------------------------------------------------------------------------|

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**THIS DOCUMENT RELATES TO:  
ALL ACTIONS**

**The Alexander Objector's Consolidated Reply to Co-Lead Class Counsel's  
Response to their Motion to Compel Compliance with CMO5 and their  
Supplemental Objection to Co-Lead Class Counsel's Fee Petition**

The Alexander Objectors file this brief reply to Co-Lead Class Counsel's Consolidated Memorandum (1) in Opposition to the Alexander Objectors' Motion to Compel Compliance with CMO5, and (2) in Response to the First Supplement in Support of the Alexander Objector's Objections:

**CMO 5**

The Alexander Objectors have asked the Court to compel Co-Lead Class Counsel to file their Case Management Order No. 5 (ECF 3710, CMO 5) Quarterly Fee/Expense Reports, along with the underlying Summary Time and Expense Report Forms. The Court ordered the data maintained in 2012. Co-Lead Class Counsel does not want those reports and data made public, though they claim \$112.5 million in fees is reasonable for the work performed but undisclosed.



In 2017, Co-Lead Class Counsel says CMO5 was for its benefit:

“CMO5 was ... adopted for ... the Plaintiffs’ court-appointed leadership – so that time reports could be regularly received from firms performing common benefit work and periodically evaluated so that, down the road, Co-Lead Counsel (who subsequently were appointed as Co-Leas Class Counsel) would be in an informed position to base any combined fee application or recommended fee allocation.” *See* Co-Lead Class Counsel’s Consolidated Memorandum in Opposition, ECF 8440, at p. 4 (citing nothing).

In 2012, Co-Leas Class Counsel said this about CMO5, when asking for it:

1. “Imposing record-keeping procedures and requiring submission of periodic reports ‘encourages lawyers to maintain records adequate for the Court’s purposes,’ and facilitates **Court review** of later-submitted fee petitions, if any.” ECF 3698, at p. 3, citing Manual for Complex Litigation (Fourth) section 14.213 (2011).
2. Section 14.213 of the referenced Manual suggests not only maintaining contemporaneous time records “in any large litigation, but also use of that specific data “as a cross-check on the percentage-of-fund method.”

CMO5 data was not ordered maintained and certified for Co-Lead Class Counsel’s internal use. Upon Co-Lead Class Counsel’s motion, it was ordered for the auditor’s review and then the Court’s use. Co-Lead Class Counsel offers no post-settlement confidentiality or privacy concerns to public disclosure of fee and expense statement; they simply don’t want anyone to “nitpick.” CMO5 is the nitpick – one engaged in by Co-Lead Class Counsel voluntarily. And, the Class Members should have a chance to see the fee data that purports to justify exhausting the \$112.5 million fee fund before the Court begins appropriating the “5% set-aside” from each Class Member’s settlement for “new” money to cover future fees, including the \$5 million in “new fees” already dedicated by Co-Lead Class Counsel to the set-aside

that has not yet been ordered. *See* Proposed Allocation of Common Benefit Attorneys Fee, ECF 8447, p. 19.

In the alternative, Co-Lead Class Counsel urges that the Court does not need the fee/expense data:

“There is particularly no need here for the kind of painstaking inspection of time records and auditor’s reports that that Alexander Objectors envision. Having closely overseen this litigation for more than five years now, the Court is well acquainted with the efforts of counsel performing common benefit work.” *See* Co-Lead Class Counsel’s Consolidated Memorandum in Opposition, ECF 8440, at p. 6.

But, of course

1. The Court is well acquainted with attorney hours spent *with the Court*; but the Court did not spend 50,912.39 hours with counsel. By this logic, timesheets would never be necessary.
2. The data should already exist; by Court order, it has been prepared, certified and *reviewed by the auditor* this Court appointed. The Court ORDERED it be done quarterly and ORDERED that if it wasn’t done, the fee “will not be considered for common benefit payments if a Common Benefit Fund is later established by this Court.”
3. This Court has already appointed Professor Rubenstein to provide his expert opinion on the reasonableness of requiring class members to contribute a portion of their recoveries to pay fees and whether such process “will result in attorney over compensation (double-dipping).”
4. If Professor Rubenstein cannot see what services are covered by the first dip, he cannot assess whether counsel are double dipping.

CMO5 data need not be painstakingly reviewed because it should already comply with the previously-established guidelines and should have already been vetted by Alan B. Winikur, CPA/ABV/CFF. And, “[s]uch records are an important factor in determining the total reasonable hours spent on the case and who actually performed the work that produced the result.” See Judge Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371, 383 (2014).

The Court has now ORDERED (ECF 8367) Co-Lead Class Counsel to provide a “detailed submission as a proposal for the allocation of lawyers’ fees” including “precise amounts to be awarded” and “justification of those amounts based on an analysis of the work performed.” That analysis is not based upon the CMO5 data. It is not based upon any audited time. Instead, it is an ad hoc divination of the relative value of each of the firms’ contributions that is a “substantive, procedural, and practical failure,” just as it was in *Vioxx*. See Charles L. Becker, *How Not to Manage a Common Benefit Fund: Allocating Attorneys’ Fees in Vioxx Litigation*, 9 DREXEL L. REV. 1, 24 (noting the failings of the point system in the *Vioxx* litigation and observing that “[l]odestar has stood the test of time” and is a most useful tool when allocation is proposed by “self-interested actors”).

Here, Co-Lead Class Counsel, serving as the allocator, has a financial interest in the resulting awards. That does not mean Co-Lead Class Counsel’s proposed allocation is disqualified or *per se* wrong. It does mean that the Court is being asked

to give deference to “the fox who recommends how to divvy up the chickens.” *In re: Diet Drugs*, 401 F.3d 143, 173 (3d Cir. 2005) (Ambro, J., concurring) (analyzing the “procedure by which allocation [is] rendered”). Although Co-Lead Class Counsel has criticized the Alexander Objectors for “nitpicking” the conclusory lodestar data, Co-Lead Class Counsel has returned exclusively to this superficial, unaudited data to make proposed allocations upon which the Court is asked to rely. Requiring public disclosure of the CMO5 data will provide transparency to the determination of “relative value of the contribution” of the firms because the CMO5 data required the details of the contribution and it set forth the contributions that the Court believed was valuable. Disclosure and use of the CMO5 data will bring the transparency to this process to which courts uniformly aspire.

#### SUPPLEMENT TO OBJECTION TO FEE PETITION

Co-Lead Class Counsel “begs a question:” The Alexander Objectors answer:

Why are the Alexander Objectors relying upon a three-month old (June, 2017) joint status report showing the claims the administrator has authorized payment of only two (2) out of the 869 total claims made? *See* ECF 7827-1, p. 9.

The Alexander Objectors are relying upon the June, 2017 joint status report because *it is the only report* Co-Lead Class Counsel and the NFL parties have filed since the the claims process was “launched” on March 23, 2017.

#### PRAYER

For the reasons set forth herein, and in their motion, the Alexander Objectors ask the Court to compel Co-Lead Class Counsel—and all other counsel who intend

to seeks attorneys' fees and expense reimbursements—to file the Quarterly Reports contemplated by CMO 5, along with the underlying Summary Time and Expense Report Forms.

Date: October 12, 2017

Respectfully Submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's ECF system on October 12, 2017.

/s/ Lance H. Lubel  
Lance H. Lubel

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Hon. Anita B. Brody

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**CO-LEAD CLASS COUNSEL'S MOTION TO (1) DIRECT CLAIMS  
ADMINISTRATOR TO WITHHOLD ANY PORTIONS OF CLASS MEMBER  
MONETARY AWARDS PURPORTEDLY OWED TO CERTAIN THIRD-PARTY  
LENDERS AND CLAIMS SERVICES PROVIDERS, AND (2) DIRECT DISCLOSURE  
TO THE CLAIMS ADMINISTRATOR OF EXISTENCE OF CLASS MEMBER  
AGREEMENTS WITH ALL THIRD PARTIES**

Co-Lead Class Counsel respectfully moves the Court to enter an Order (1) directing the Claims Administrator to withhold any portions of Class Member monetary awards purportedly owed by Class Members to certain third-party lenders (including funders and so-called asset purchasers), and claims services providers; and (2) directing all individually-retained counsel and Class Members themselves, if they have not retained individual counsel, to disclose to the Claims

Administrator the existence of and terms of Class Member agreements with all third-party lenders and claims services providers. Such funds should be withheld following the Notice of Monetary Award Claim Determination for each Class Member for which such Notice is issued, pending further order of this Court as to the third parties' entitlement to such funds generally, or until such time as the third party in question shows cause to the Court or the Special Masters as to its entitlement to such funds.

The third parties as to which withholding is sought are the following:

**Lenders**

- Atlas Legal Funding, LLC<sup>1</sup>
- Cambridge Capital Group, LLC<sup>2</sup>
- Cash4Cases, Inc.
- Global Financial Credit, LLC
- HMR Funding, LLC<sup>3</sup>
- Justice Funds/Justicefunds, LLC
- Ludus Capital, LLC
- Peachtree Funding Northeast, LLC/Settlement Funding, LLC<sup>4</sup>
- Pravati Legal Funding/ Pravati Capital, LLC
- RD Legal Funding, LLC<sup>5</sup>
- Thrivest Specialty Funding, LLC
- Top Notch Funding/Top Notch Lawsuit Loans/Top Notch Funding II, LLC
- Walker Preston Capital Holdings, LLC

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<sup>1</sup> The related entities also included are Atlas Legal Funding I, L.P., and Atlas Legal Funding II, L.P.

<sup>2</sup> The related entities also included are Cambridge Capital Group Equity Option Opportunities, L.P., and Cambridge Capital Partners, L.P.

<sup>3</sup> The related entities also included are HMRF Fund I, LLC and HMRF Fund II, LLC.

<sup>4</sup> The related entities also included are Peachtree Settlement Funding, LLC, Peachtree Originations, LLC, Peachtree Financial Solutions, LLC, Peach Holdings, LLC, PeachHI, LLC, Orchard Acquisition Co. LLC, JGWPT Holdings, LLC, JGWPT Holdings, Inc., J.G. Wentworth, LLC, J.G. Wentworth S.S.C. Limited Partnership, J.G. Wentworth Structured Settlement Funding II, LLC, and Structures Receivables Finance #4, LLC.

<sup>5</sup> The related entities also included are RD Legal Finance, LLC, and RD Legal Funding Partners, LP.

**Claims Services Providers**

- Case Strategies Group (formerly NFL Case Consulting, LLC)
- Legacy Pro Sports, LLC

The reasons supporting this Motion are set forth in the accompanying declaration and memorandum of law.

Dated: October 23, 2017

Respectfully submitted,

/s/ Christopher A. Seeger  
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*Co-Lead Class Counsel*



**CERTIFICATE OF SERVICE**

It is hereby certified that a true and correct copy of the foregoing motion, along with the supporting documents, were served electronically via the Court's electronic filing system upon all counsel of record in this matter. True and correct copies of the foregoing motion and supporting documents were served upon the below counsel for the third parties addressed in this Motion or upon the third party itself, if counsel have not communicated previously with Class Counsel. Service is being made via Federal Express, overnight delivery and via email for those with whom Class Counsel previously have communicated via email.

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Dated: October 23, 2017

/s/ Christopher A. Seeger  
Christopher A. Seeger

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
LITIGATION**

**KEVIN TURNER & SHAWN WOODEN**  
on behalf of themselves and others similarly  
situated

**V.**

**National Football League and  
NFL Properties LLC,  
successor-in-interest to NFL Properties, Inc.**

**THIS DOCUMENT RELATES TO:  
ALL ACTIONS**

=====

**No. 12-md-2323 (AB)**

**MDL No. 2323**

**Hon. Anita B. Brody**

**Civ. Action No. 14-00029-AB**

**ARMSTRONG OBJECTORS' RESPONSE TO CLASS COUNSEL'S PROPOSED  
ALLOCATION OF COMMON BENEFIT ATTORNEYS' FEES, PAYMENT OF  
COMMON BENEFIT EXPENSES, AND PAYMENT OF CASE CONTRIBUTION  
AWARDS TO CLASS REPRESENTATIVES**

The Armstrong Objectors file this Response to Class Counsel's Proposed Allocation of Common Benefit Attorneys' Fees, Payment of Common Benefit Expenses, and Payment of Case Contribution Awards to Class Representatives ("Proposed Allocation") (Doc. #8447), and respectfully state the following.

1. On March 1, 2017, the Armstrong Objectors filed their Fee Petition (Doc. #7230) and Supporting Memorandum of Law (with Declarations) (Doc. #7232). Thereafter, Class Counsel opposed it as part of their fee petition omnibus response brief (Doc. #7464). The Armstrong Objectors subsequently filed a Reply brief in support of their Fee Petition (Doc. #7608).<sup>1</sup>

2. In its September 11, 2017 Order ("Order") (Doc. #8367), the Court directed Co-Lead Class Counsel, Christopher A. Seeger, to "submit a detailed submission as a proposal for the allocation of lawyers' fees among class counsel including the precise amounts to be awarded along with a justification of those amounts based on an analysis of the work performed." In response to the Court's Order, Class Counsel filed their Proposed Allocation (Doc. #8447).

3. Notwithstanding the Court's Order, however, Class Counsel did not address or analyze (much less, reference) the Armstrong Objectors' Fee Petition. For this reason, the Armstrong Objectors object to Class Counsel's Proposed Allocation as being incomplete and violating the Court's Order.

4. To the extent Class Counsel's failure to address the Armstrong Objectors' Fee Petition in the Proposed Allocation is intended to mean that Class Counsel does not propose to allocate any attorneys' fees to the Armstrong Objectors, the Armstrong Objectors object to the Proposed Allocation for the reasons set forth in their Fee Petition and related briefing. The Armstrong Objectors' fee request is imminently reasonable in light of the work performed and results

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<sup>1</sup> The Armstrong Objectors incorporate Doc. ##7230, 7232, and 7608 (including their Counsel's declarations), by reference, as if fully stated herein.

obtained. By way of reference, Class Counsel propose to allocate \$150,000 to Counsel for the Faneca Objectors, MoloLamken/Hangley, *et al.* See Proposed Allocation (Doc. #8447) at 13-14. As detailed in their Fee Petition and related briefing, Counsel for the Armstrong Objectors performed as much, if not more, meaningful work, and achieved as much, if not more, for the Class than Faneca Objectors' Counsel. Respectfully, the Armstrong Objectors' Fee Petition should be granted.

Date: October 25, 2017

Respectfully submitted,

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**COUNSEL FOR THE  
ARMSTRONG OBJECTORS**

**CERTIFICATE OF SERVICE**

I certify that a true copy of the Armstrong Objectors' Response to Class Counsel's Proposed Allocation of Common Benefit Attorneys' Fees, Payment of Common Benefit Expenses, and Payment of Case Contribution Awards to Class Representatives was served on all counsel of record, via the Court's ECF system, on October 25, 2017.

/s/ Richard L. Coffman  
Richard L. Coffman

**COUNSEL FOR THE  
ARMSTRONG OBJECTORS**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|                                                    |   |                             |
|----------------------------------------------------|---|-----------------------------|
| IN RE; NATIONAL FOOTBALL LEAGUE                    | ) | No. 2:12-MD-02323 – AB      |
| PLAYERS’ CONCUSSION INJURY LITIGATION,             | ) |                             |
|                                                    | ) | MDL NO. 2323                |
|                                                    | ) |                             |
|                                                    | ) |                             |
| Kevin Turner and Shawn Wooden, <i>on behalf of</i> | ) |                             |
| <i>themselves and others similarly situated,</i>   | ) |                             |
|                                                    | ) | CIVIL ACTION NO: 14-cv-0029 |
| Plaintiffs,                                        | ) |                             |
|                                                    | ) |                             |
| v.                                                 | ) |                             |
|                                                    | ) |                             |
| National Football League and NFL Properties, LLC   | ) |                             |
| successor-in-interest to NFL Properties, Inc.,     | ) |                             |
|                                                    | ) |                             |
| Defendants.                                        | ) |                             |
|                                                    | ) |                             |

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THIS DOCUMENT RELATES TO ALL ACTIONS

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**COUNTER-DECLARATION OF JASON E. LUCKASEVIC  
IN RESPONSE TO THE DECLARATION OF CHRISTOPHER A.  
SEEGER IN SUPPORT OF PROPOSED ALLOCATION OF COMMON BENEFIT  
ATTORNEYS’ FEES, PAYMENT OF COMMON BENEFIT EXPENSES, AND  
PAYMENT OF CASE CONTRIBUTION AWARDS TO CLASS REPRESENTATIVES**

**COUNTER-DECLARATION OF JASON E. LUCKASEVIC  
IN RESPONSE TO THE DECLARATION OF CHRISTOPHER A.  
SEEGER IN SUPPORT OF PROPOSED ALLOCATION OF COMMON BENEFIT  
ATTORNEYS' FEES, PAYMENT OF COMMON BENEFIT EXPENSES, AND  
PAYMENT OF CASE CONTRIBUTION AWARDS TO CLASS REPRESENTATIVES**

1. My name is Jason Luckasevic and I have been an attorney since 2000. I am a Shareholder at Goldberg, Persky & White, P.C. in Pittsburgh, PA. I am frequently asked to speak and be interviewed internationally on the topic of sports-related head injuries and the origination of the lawsuit against the NFL.
2. More than a decade ago, I began researching the case that has become commonly known as the NFL Concussion litigation. My firm and I initiated the first lawsuits against the NFL for harm caused to retired players from chronic brain injuries that developed years after their careers ended as a result of years of repeated blows to the head. Along with our co-counsel, my firm and I were the first to file a lawsuit for damages on behalf of individual players. The legal strategies I developed, in consultation with lawyers at my firm in Pittsburgh and lawyers in Miami and Los Angeles that joined with us on this case, became the basis for pursuing the claims in MDL 2323 before this Court.
3. My pioneering role in the NFL litigation regarding brain injuries has been well-documented in the media. It was highlighted by award-winning journalists Mark Fainaru-Wada and Steve Fainaru in the book *League of Denial*, and in their related Frontline documentary of the same name, which won the industry's highest honor, a Peabody Award. In addition, I was the subject of Michael Sokolove's November 2014 cover story in the New York Times Magazine ("How One Lawyer's Crusade Could Change Football Forever"). Jeanne Marie Laskas, in her book *Concussion*, wrote that the family of Junior Seau, an NFL Hall of Famer, "joined the consolidated lawsuits against the NFL that had started with Luckasevic's initial filing."



4. I mention the above only to help establish that my firm should be fairly compensated for our leading role in this important case. That role was acknowledged by co-lead class counsel, Christopher Seeger who, when asked about me by Michael Sokolove, said: “Being the first to file is incredibly important. He took a risk.” An examination of the facts leads to the conclusion that my firm is entitled to share fairly in Common Benefit funds.

5. Firms that take the risk to originate significant successful litigation like that which arose in this matter should be compensated for their actions out of a Common Benefit Fund. *See re Vioxx Products Liability Litigation*, 802 F.Supp. 2d 740, 780 (E.D.La. 2011) (noting in awarding common benefit fund fees that a firm had “been at the forefront of the Vioxx litigation since its inception in 2001”, four years before the beginning of that MDL, having filed the second Vioxx case that year); *In re Cendant Corp. Securities Litigation*, 404 F.3d 173, 195 (3d Cir.

2005)(stating in relation to a securities class action that “[w]e therefore conclude that the court’s involvement in the fee decision will be at its height when the fee request is for work performed before the appointment of the lead plaintiff. If an attorney creates a substantial benefit for the class in this period—*by, for example, discovering wrongdoing through his or her own investigation, or by developing legal theories that are ultimately used by lead counsel in prosecuting the class action*—then he or she will be entitled to compensation whether or not chosen as lead counsel.”)

6. The narrative of my efforts on behalf of NFL Players begins with Dr. Bennet Omalu. Dr. Omalu, a neuropathologist, had served as an expert in my cases since the beginning of my legal career. Over the years, we gained a mutual respect for each other professionally and thereupon developed a friendship. In late 2006, Dr. Omalu came to my office in Pittsburgh to discuss an expert report that he had prepared for one of my cases as well as to pick up some pathology

materials on the next case that he was going to analyze. Coincidentally, there was an article in that morning's Pittsburgh Post-Gazette concerning Dr. Omalu's findings of chronic traumatic encephalopathy ("CTE") in the brain of Terry Long, a former player for the Pittsburgh Steelers.

7. Dr. Omalu was harshly criticized in the article by Dr. Elliot Pellman, the head of the NFL's Mild Traumatic Brain Injury Committee, as well as by Dr. Joseph Maroon, the team physician for the Pittsburgh Steelers. Their criticism included words such as "unscientific" and "speculative" when describing Dr. Omalu's findings of CTE in Terry Long's autopsy. I was surprised and shocked by such harsh criticism of a friend whose work I greatly respected, and whose groundbreaking research, in time, would be proven correct.

8. I told Dr. Omalu to fight back. I was concerned that the criticism could ruin his career, and the NFL players and their families deserved to know the truth. It was then that he suggested that I investigate filing a lawsuit against the NFL. The very next day Dr. Omalu began introducing me to certain well-respected members of the scientific community who were not only aware of his opinions, but supported them. He also introduced me to many former players and families who had reached out to him after reading some of the articles on his groundbreaking neuropathology discovery.

9. I began my own investigation into the science of head injuries and spoke with leaders in the field, including two doctors, Robert Cantu, M.D. and Julian Bailes, M.D., who, with Dr. Omalu, are considered pioneers in the field. I briefed myself on the research that led Dr. Omalu to conclude that football had first disabled, and then killed, Pittsburgh football legends Terry Long and Mike Webster. I conferred with Bob Fitzsimmons, a West Virginia lawyer and co-founder of the Brain Injury Research Institute, who was one of the first to contemplate the legal ramifications of football and brain injuries. My investigation involved reading and reviewing

scientific journals. I did a literature search of medical articles concerning sports and concussions and CTE-like conditions. I discovered nearly one hundred journal articles, many of which were cited in my original Complaint and then recopied into the Master Class Action Complaint filed by the Plaintiff's Steering Committee.

10. I reviewed the history of the NFL over its decades of existence, the formation of the league and its corporate structure, myriad injury reports, as well as rule changes and new penalties that may have been intended to reduce the occurrence of brain injuries, but failed to do so. I learned about the NFL's Mild Traumatic Brain Injury Committee, and read the articles dozens of articles it published contesting Dr. Omalu's findings.

11. I read about retired players' struggles in media reports. I studied other sports leagues, particularly the NHL and its management of concussions. I researched return-to-play guidelines that had been in existence for decades in published literature. I spoke to players, families, and widows. I ordered medical records and reviewed family histories. I even investigated other causes and sources of the neurocognitive impairments in an effort to understand all aspects of the disease.

12. I studied the issue of neurocognitive impairments intensely and became intimately familiar with the unique cognitive and behavioral symptoms surrounding CTE. I explored the issue of causation. It was always the biggest question: How can it be proven that the disease was caused from football? I also spent countless hours discussing that very issue with Dr. Omalu.

13. I then turned to conducting a legal analysis. I explored past lawsuits against the NFL. There were over 35 published cases where the NFL was sued. Most were anti-trust cases, but there were three cases that analyzed legal issues of negligence and personal injury. I reviewed

the materials on the dockets of those cases, reading the pleadings and orders and reviewed the evidence. I learned for the first time that the NFL routinely escaped liability due to labor preemption under the Labor Management Relations Act (“LMRA”) based on its collective bargaining agreement with the players. I spent hundreds of hours determining whether there were any legal theories that would circumvent the preemption under the LMRA. I read and studied many of the past voluminous NFL collective bargaining agreements. I studied the NFL disability plan. I researched the Mike Webster case against the disability plan. I analyzed workers compensation cases to rule out the NFL as an employer.

14. During this same time period, I brought the case to the Shareholders of my firm, which for 30 years had primarily litigated asbestos cases. The Shareholders expressed hesitancy about the substantial commitment of financial and personnel resources such an undertaking would involve. Hence the members of my firm refused to take on the NFL on their own. Therefore, I made efforts to associate with other law firms in an effort to consolidate resources, however, I was met time after time with uncertainty and doubt about the massive undertaking of such a lawsuit.

15. Beginning in 2010, additional compelling scientific research was published that supported Dr. Omalu’s discovery. Also more deceased players were confirmed to have CTE in their brains at autopsy.

16. At the end of 2010, we became associated with the law firm Russomanno & Borrello from Miami, FL as a litigation partner in this matter. In early 2011, our team added the California firm Girardi Keese, and we decided to file the first lawsuit against the NFL in California state court.

17. Before we could file the lawsuit, the NFL locked out its players in February of 2011. We continued to work on the draft Complaint and researched the issue of suing an entity when there was no active collective bargaining agreement and the players' union had been disbanded. Ultimately, we decided it was to our client's benefit to file the Complaint during the period of the lockout and while the union was disbanded. By July 19th, we had 75 clients and filed the Complaint against the NFL in *Maxwell v. NFL* in Los Angeles County Superior Court, California. This case has repeatedly been referenced by this Court and the Third Circuit Court of Appeals as the case which originated the NFL Concussion litigation. Word of the lawsuit against the NFL spread quickly as national media outlets reported on the filing and continued bringing attention to the "concussion in sports crisis." By August 3<sup>rd</sup>, our team filed suit on behalf of another 47 players, *Pear vs. NFL*.

18. Shortly thereafter, as anticipated, the NFL removed the case to Federal Court, arguing LMRA preemption. It was assigned to Judge Manuel Real, of the United States District Court of California. On December 8, 2011, Judge Real denied Plaintiffs' Motion to Remand. In fact, Judge Real compared the claims to those in *Stringer v. NFL*. In *Stringer vs. NFL*, the Court dismissed the negligence claims as to the NFL, but litigated the claim as to negligence for licensing the Riddell helmet. As an aside, the Stringer plaintiffs did not allege claims of fraud or negligence as a monopolist.

19. Shortly after Judge Real's decision, a scheduling order was issued on the briefing of the Motions to Dismiss based on preemption filed by the NFL. My office took the lead on preparing the responses with input from our co-counsel. *Maxwell* and *Pear* were scheduled for argument on the issue of legal preemption until law firms from around the country started copying our Complaints and filed claims for other retired NFL players. This resulted in the NFL requesting

the creation of an MDL before the Judicial Panel on Multidistrict Litigation. Ultimately, all present and future cases were assigned to this Court.

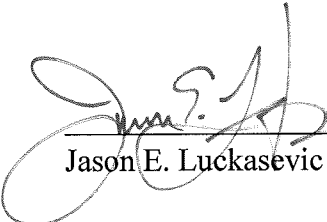
20. In support of this Counter-Declaration I have attached as Exhibits the Declarations or Affidavits of Bennet I. Omalu, M.D. (Exhibit A), Thomas V. Girardi, Esquire (Exhibit B), Robert P. Fitzsimmons, Esquire (Exhibit C), Robert A. Stein, Esquire (Exhibit D), Herman J. Russomanno, Esquire (Exhibit E), Robert Cohen, Esquire (Exhibit F), and Peter J. Paladino, Jr., Esquire (Exhibit G).

21. In his Declaration, Mr. Seeger seemingly minimizes the work of my firm detailed above in relation to this matter, relating only the following sentence: "Goldberg, Persky & White was involved in certain early cases that preceded the formation of this MDL." Declaration of Christopher A. Seeger in Support of Proposed Allocation of Common Benefit Attorneys' Fees, Payment of Common Benefit Expenses, and Payment of Case Contribution Awards to Class Representatives, ECF No. 8447, at ¶15f.

22. Moreover, Mr. Seeger recommended that Goldberg, Persky & White receive a lodestar of only "1" in relation to its MDL work.

23. Based on the information provided above, this Court should fairly award us Common Benefit funds or, in the alternative, should increase the lodestar multiplier to which Goldberg, Persky & White is entitled.

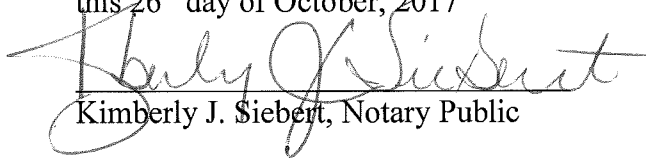
Further Affiant sayeth naught:

  
Jason E. Luckasevic  
10-26-17  
(date)

Commonwealth of Pennsylvania     }  
                                                     }  
County of Allegheny                   }

On this, the 26<sup>th</sup> day of October, 2017, before me, Jason E. Luckasevic, Esquire, of  
Goldberg, Persky & White, P.C., the undersigned, personally appeared.

Sworn to and subscribed before me  
this 26<sup>th</sup> day of October, 2017

  
Kimberly J. Siebert, Notary Public

*My commission expires:*

COMMONWEALTH OF PENNSYLVANIA  
NOTARIAL SEAL  
Kimberly J. Siebert, Notary Public  
City of Pittsburgh, Allegheny County  
My Commission Expires June 27, 2021  
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*  
  
Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,  
  
Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Civ. Action No. 14-00029-AB

**COUNTER DECLARATION OF CRAIG R. MITNICK IN RESPONSE TO CO-LEAD  
CLASS COUNSEL, CHRISTOPHER SEEGER'S DECLARATION FOR THE  
ALLOCATION OF AN AWARD OF COMMON BENEFIT ATTORNEY'S FEES AND  
REIMBURSEMENT OF COMMON BENEFIT COSTS AND EXPENSES**

**In Re National Football League Player's Concussion Injury Litigation**

Craig R. Mitnick declares as follows pursuant to 28 U.S.C. § 1746:

I am the Managing Partner of the law firm of Mitnick Law Office, LLC and submit this Declaration in support of Mitnick Law Office's request for a fair and reasonable share of common benefit fees and in response to co-lead counsel, Christopher Seeger's recommendation set forth in his Declaration under date of October 10, 2017 with regard to those fees. I have



personal knowledge of the matters set forth in this declaration and, if called upon, I could and would testify competently thereto.

### *Introduction*

1. My firm was tasked by co-lead counsel with the challenge of developing and executing a *comprehensive and global* campaign that would ensure the endorsement of the negotiated Settlement terms by the global class of retired NFL players. This task was to supplement the work that was to be performed by the communication committee and the public relations firm working on the matter.
2. Mitnick Law Office arranged for formal presentations at NFL Alumni Chapters around the country. I then personally traveled from city to city, over a period of 36 months, to formally educate the retired NFL player community on the terms of the negotiated Settlement Agreement, as well as ensuring global endorsement of those terms by minimizing the number of player opt-outs. I personally drafted comprehensive and compelling presentation materials that were distributed to thousands of retired NFL players and their wives throughout my travels. I prepared and continually updated *frequently asked questions* in regard to the Settlement terms that were distributed in print and published online. I engaged and led mass retired player conference calls with thousands of retired NFL players, focusing on education, awareness and endorsement of the Settlement. I formally gave comprehensive presentations to retired players at the Super bowl XLVIII venue and at the 2014 Hall of Fame induction ceremony venue in Canton, Ohio. Additionally, I ensured that thousands of retired players throughout the country understood the legal obstacles of the concussion litigation in order to understand the tremendous benefits that the negotiated Settlement provided for.
3. Throughout Mr. Seeger's fee application and recommendation for the allocation of common benefit fees, he thoroughly and accurately describes the contributions that his firm, Seeger Weiss brought to this litigation. However, I would suspect that due to his vast involvement in every aspect of the litigation, in addition to the leadership demands that were placed on his firm, I do not believe that Mr. Seeger had the opportunity to thoroughly review my contributions and assess the true value of those contributions to the Settlement Class at the time he submitted his allocation recommendation.

4. Even though I represented more retired NFL players than any other firm involved in the litigation at the time the leadership structure was formed in early 2012, Mr. Seeger was not made aware of the fact that I was promised a position on the steering committee, as well as on various other committees by a current member of the PEC. Given that lack of leadership position, I believe that Mr. Seeger was placed in an untenable situation when it came to his ability to allocate a true multiplier to the contribution by my firm. Mr. Seeger nor the Court can ignore the traditional politics, however unfortunate, involved in these sort of high profile and complex litigation matters.
5. It is clear from Chris Seeger's Declaration to the Court under date of October 10, 2017, that I did not act as a rouge warrior for the common benefit of the Settlement class, but rather was authorized and directed specifically by Co-lead counsel.

*"Mitnick Law served at the direction of Co-Lead Counsel in the multi-faceted outreach efforts to the Retired NFL Player Community, including in-person events with alumni and other NFL players' associations, which became increasingly important after the Settlement had received Preliminary Approval".*

6. In early September of 2013, almost immediately after the terms of the initial Settlement Agreement were made public, I met with Chris Seeger in the Northern New Jersey/New York City area to discuss preliminary approval of the Settlement. During the lunch meeting with Mr. Seeger and after authorization and direction from him, I began to spend as much time and energy as was necessary to *educate, inform* and ultimately garner the *endorsement* of the Settlement terms by the twenty thousand member global class.
7. From the time of that meeting with Mr. Seeger, I developed a "*Post Settlement Player Awareness and Education Campaign*" designed to maximize endorsement of the Settlement by the retired NFL player community by minimizing player opt-outs. I spent the vast majority of my time executing that plan from September 2013 until the time the District Court granted final Approval of the Settlement Agreement in April of 2015. I spent in excess of 1300 hours educating retired players on the litigation, addressing many of their concerns, answering their questions and ultimately garnering the approval of the vast majority of retired players throughout the country.

8. Throughout the process, I educated thousands of retired players. I was fully aware of the importance of effectively explaining the legal obstacles that each of the retired players faced with regard to preemption and causation, as many players had to first understand these legal concepts in order to then understand that a negotiation is a give and take and not a one sided process.

*An unprecedented approval rating of 99% of the retired player community*

9. Procuring the endorsement of as many Retired NFL Players within the twenty thousand retired player Class was my primary objective from the date I met with Mr. Seeger in September of 2013. The countless hours of preparation time, travel time, presentation time and time spent on the development and distribution of informational materials was instrumental to the unprecedented approval rate of over 99% of the twenty thousand member Class. This fact cannot be disputed. This unprecedented Class endorsement of 99% was a critical factor in lead counsel's final argument in support of Final Approval at the Final Fairness Hearing on November 19, 2014. Even though there was a communication committee and a public relations firm involved in the litigation, my efforts were far more encompassing and far more personal to the retired players. Co-lead counsel's Declaration in Support of the Final Fairness Hearing that was filed with the Court prior to November 19, 2014 hearing read in pertinent part:

*"The reaction of the Class has been extremely favorable. As the Opt-Out/Objection deadline, fewer than 1% of Retired NFL Players filed requests for exclusion from the Settlement....In a case as highly publicized as this one, where significant claims are at stake, and more than 5,000 individual actions were filed in the MDL alone, this positive response of Class Members should be given great weight". Additionally, Mr. Seeger wrote "For a Class of approximately 20,000 Retired NFL Players, this high level of favorable response is remarkable...." (See Declaration of Christopher Seeger in support of Final Approval of Settlement and Certification of Class and Subclasses, paragraph 71, under date of 11/12/14).*

9. At the time of the Final Fairness hearing, Mr. Seeger concluded his oral argument in support of the Settlement becoming final by passionately reiterating to the Court the fact that over 99% of the Player-Class endorsed the Settlement that he had successfully negotiated. After Mr. Seeger's oral argument ended and he turned the floor over to Lead Counsel for the

National Football League Parties, Brad Karp, Mr. Karp opened his remarks to the Court with the same 99% endorsement argument as Mr. Seeger. (*See Court Transcript under date of November 19, 2014*).

*Background*

10. For over three decades, I have developed strong professional and personal relationships with countless retired NFL players. In early December of 2011 after hearing rumblings about the initial litigation against the NFL for concussion related injuries, I spoke with several key influences in the retired player community who contacted me about the litigation. After spending substantial time reviewing the limited pleadings on record at the time, as well as personally researching the science behind the Plaintiff's allegations, I made a decision to become involved in the litigation due to my belief that the correlation between playing football and sustaining unexpected long term cognitive injury was real, with the injuries to players often devastating.
11. I received my BBA in finance from Emory University (Atlanta, Georgia) in May of 1984 and subsequently received my Juris Doctor from the George Washington University School of Law (Washington DC) in May of 1987. Throughout my career I have litigated and/or negotiated hundreds of cases in both State and Federal Court. Additionally, in 2004, given my litigation history and my communication abilities, I was hired as an on-air legal analyst for Fox News channel, CBS television and radio and syndicated radio stations throughout the country. I was able to effectively engage millions of viewers on diverse legal issues, including congressional hearings, United States Supreme Court decisions, matters involving multidistrict and mass tort litigation, including the World Trade Center First Responder litigation, asbestos litigation and various Bellwether trials.
12. My work contribution described in detail below, along with the declarations, presentation materials and other exhibits attached, clearly demonstrate that I contributed immense value to final approval of the Settlement Agreement, as well as to the Settlement Class members.

*Execution of the strategic educational and awareness campaign*

13. From the time that the first Settlement Agreement was announced in August of 2013 through the time that the Settlement received final approval from the Court in April of 2015, I personally met with individual key decision makers and influencers within the NFL Alumni

Community in order to gain their support for the Settlement and then introduced many of these key influencers to Co-lead counsel, as well as to the public relations team working on the matter. A sample listing of of those key influencers included:

*Ron Jaworski* (Member NFL Alumni Association Board of Directors), *Bart Oates* (President New York/New Jersey NFL Alumni Chapter member NFL Alumni Association Board of Directors), *Al Smith* (President Tennessee NFL Alumni Chapter member NFL Alumni Association Board of Directors), *Joseph Pisarcik* (former president of the NFL Alumni Association); *John Haines* (President Austin, Texas Alumni Chapter and member of the NFL Alumni Association Board of Directors); *Bill Schultz* (President Indianapolis, Indiana Alumni chapter; Co-Chair NFL Alumni Association Board of Directors), *Ron Rice* (President Detroit, Michigan Alumni Chapter; member NFL Alumni Association Board of Directors); *Jim Karsatos* (President Columbus, Ohio NFL Alumni Chapter); *Steve Thurlow* (President Connecticut NFL Alumni Chapter); *Beasley Reece* (President Philadelphia, Pennsylvania NFL Alumni Chapter), *Raul Allegre*, (Former member of the NFL Alumni Association Board of Directors and ESPN Analysis), and *Jeffery Nixon*, (NFL retired player influencer and most prominent blogger within the retired player community).

14. In a Declaration, prepared and executed by the NFL Alumni Association Board of Directors, the Board, described my contribution to the Settlement Class. That Declaration states in pertinent part:

*“Almost four (4) years ago many of us, along with our NFL Alumni Chapter members, began to hear rumblings that concussions may possibly lead to longer-term health issues. We learned that several of our teammates had filed lawsuits against the NFL for their lack of honesty when it came to the League’s knowledge in regard to any correlation between concussions and their relationship to our longer-term health.*

*The litigation was very confined at the time and based on our own conversations with many of our Chapter Presidents and members, we believe that the lawsuits would have remained confined, or in the very least would have moved at a much slower pace if not for the efforts and passion of a few individuals involved in the litigation, including Craig Mitnick.*

*Many retired players initially were extremely cautious to get involved in the lawsuits, given the fear of being labeled incompetent and the fear of being labeled greedy. Craig Mitnick kept our Board of Directors, executive staff, and most importantly our members informed and up to date during the initial filings of the lawsuits and then educated us with regard to the Settlement terms and why they were so beneficial to all of us.*

*Craig personally convinced many of our Chapter leaders and members around the Country to get involved with the litigation and as Chris Seeger worked so diligently to find a favorable settlement for us, Craig continued to keep us educated, informed and reduced the uncertainty that many of us felt. It was not the money that he spoke about, or a sales pitch to become a client of his firm, rather his passion was grounded upon the awareness of the consequences that concussions could have on our long-term health, as well as on our children and grandchildren's health.*

*Craig continually made sure that retired players in our Chapters had literature that they could take home to their wives and to show other players the benefits of joining the litigation and remaining in the litigation. Whether Craig spoke at the Super bowl, the Hall of Fame, or at NFLAA Chapter meeting, the information received was so critical to many retired players' endorsement of the case, as we were able to understand the obstacles we faced and the benefits of the ultimate Settlement.*

*We feel that the hard work, passion, and personal interaction by Craig Mitnick, with hundreds, if not thousands of our members was a driving factor in how quickly the case picked up momentum and how quickly the matter was ultimately endorsed by ninety-nine (99%) percent of our player community...*

*We are fully aware that Attorneys involved in the case took on different roles at different times and all of them should be commended. However, specifically Chris Seeger's efforts in getting the deal done and Craig Mitnick's efforts in solidifying the Settlement with former players by educating us, keeping us informed and explaining the legalities and benefits of the deal were unmatched. We thank both of them immensely" (See NFL Alumni Association Board of Directors Declaration attached hereto and marked as Exhibit A).*

15. Further endorsement from additional high profile and influential alumni from different retired players organizations that I was personally responsible for included: Super Bowl Champion and long-time Cornerback - *Isaac Holt*; Fullback and well known Broadcaster - *Keith Byers*; Hall of Fame Inductee- *Leroy Kelly*; four time Pro-Bowl Offensive Lineman and television star - *Alex Karras*; Veteran Cornerback and National Sports Broadcaster - *Eric Allen*; Renown Super Bowl Champion and Pro-Bowl Quarterback - *Mark Rypien*; Super Bowl champion and Veteran Defensive-End - *Carl Hairston*; Long time Strong Safety - *Rich Miano*; two time Super Bowl Champion and Pro-Bowl Quarterback - *Jeff Hostetler*; six time Pro-Bowl Offensive lineman - *Grady Alderman*; two time Pro-Bowl running back- *Marion Butts*; All American and two time Pro-Bowl quarterback - *John Brody*; long time Veteran Running Back-*Theron Sapp*; four time Pro-Bowl Champion and two time All American Linebacker - *Jeremiah Trotter*; three time Pro-Bowler, Super Bowl Champion and Sports Illustrated NFL Defensive Player of the year - *Seth Joyner*; two time Super Bowl Champion Defensive Tackle - *Jethro Pugh*; five time Pro-Bowl and four time All-Pro Running Back - *Chuck Forman*; Pro-Bowl champion Offensive Tackle - *Ron Solt*; and seventeen year Veteran Linebacker - *Ray Lewis*. These high-profile influencers, in addition to others unnamed, fostered thousands of additional endorsements throughout the retired player community, minimizing opt outs to less than 1%.
16. Additionally, as outlined in detail in my common benefit billing statement, a substantial amount of time was spent exclusively on obtaining print and video endorsements, from some of the most noticeable retired players within the country in order to foster further endorsement of the Settlement Agreement. Many of these endorsements were so strong that they were included in Class Counsel's brief that was filed with the Court in support of Final Settlement approval. (*See Billing statement attached hereto and marked as exhibit B*) (*See retired NFL player quotes attached hereto and marked as Exhibit C*) (*See exhibit 12 that was attached to Class Counsel's final brief in support of final approval marked as Exhibit D*).
17. In addition to garnering the endorsement of key influencers and high profile retired players, I spent countless hours of my professional time from September 2013 through August 2016, personally traveling and speaking with alumni chapters members throughout the country. I traveled, engaging thousands of retired players at organized NFL events and NFL Alumni



chapter meetings. These in-person presentations were highly publicized by Alumni chapter presidents in order to ensure heavy turnouts by their respective retired player members. Educational, informational and question/answer sessions were held in cities that included:

- a. XLVIII Super Bowl venue in New York, New York on January 29, 2014
- b. 2014 Hall of Fame ceremony in Canton, Ohio on August 1, 2014
- c. Austin, Texas Alumni chapter special session on October 30, 2013;
- d. New York, New Jersey Alumni chapter special session on October 2, 2013, June 7, 2014 and June 6, 2014;
- e. Greenwich, Connecticut Alumni chapter special session on May 5, 2014;
- f. Indianapolis, Indiana Alumni chapter special session on December 17, 2013;
- g. retired player special session at Giant Stadium, Meadowlands, New Jersey on October 1, 2013,
- h. special video session in Fargo, North Dakota on October 21, 2014;
- i. NFLPA convention in Orlando, Florida on March 21, 2014;
- j. Cincinnati, Ohio Alumni chapter special session on December 18, 2013;
- k. Denver, Colorado Alumni chapter special session on October 25, 2014;
- l. Franklin, Tennessee Alumni chapter special session on February 5, 2015;
- m. Birmingham, Alabama session on October 23, 2014;
- n. NFLAA annual convention in Phoenix, Arizona on April 14, 2015;
- o. NFLAA special session in Las Vegas, Nevada on April 25, 2014;
- p. player gathering Chicago, Illinois on May 27, 2014;
- q. San Diego, California Alumni chapter special session on August 10, 2016.

*(See NFL Alumni Chapter concussion litigation presentation photographs attached hereto and marked as exhibit E) (See Super Bowl presentation materials attached as Exhibit F) (See Hall of Fame presentation materials attached as Exhibit G).*

18. At each one of the above listed presentations, without exception, high quality brochures and informational materials, detailing the terms of the final Settlement Agreement were distributed to each attendee. *(See retired NFL player endorsement brochures and printed handouts attached hereto and marked as Exhibit H).* Printed materials always reflected the most up-to-date relevant information on the Settlement. Copies of the informational materials were also distributed to attending spouses, as the players' spouses are often times the main decision makers in the household. Additionally, in order to educate and garner the endorsement of players in areas of the country where no formal presentation took place,



literature was sent directly to chapter members and chapter presidents. (*See Declaration of Tina Williams attached hereto and marked as exhibit I*).

19. In addition to these in-person group presentations, thousands of Retired Players were engaged through telephonic and video conference calls that focused primarily on questions and answers with regard to the Settlement Agreement. An example of a typical conference call took place on March 12, 2014. The conference call included operator assisted services and took place from the National Football League Alumni Association's corporate office in Mount Laurel, New Jersey. Participation during the call exceeded 1,700 Retired NFL Alumni members and the call lasted over an hour and a half. Members were asked to submit their questions or concerns prior to the call by emailing them directly to the Alumni Association, at which time the most commonly asked questions were identified and subsequently answered during the conference call. Additionally, Retired Players from around the Country, as well as from Canada were able to ask live questions utilizing the operator assistance service during the latter part of the call. Additional conference calls, similar to the call described above took place from October of 2013 through the time the Settlement received final approval in April of 2015. These calls varied from mass attendee participation to far more intimate calls where retired players within the NFL Player Community listened to status updates and then participated in open discussions. During the time period between March of 2012 and May of 2015, multiple calls took place with the NFL Alumni Association Board of Directors and the NFL Alumni Chapter Presidents, as well as with key influencers and decision makers within the NFLPA. (*See Conference Call materials attached hereto and marked as Exhibit J*).

20. To further solidify existing endorsements of the Settlement Agreement and garner new ones, in-person presentations were also conducted at the NFLAA annual meetings in April of 2014, April of 2015 and April of 2016, as well as at the NFLPA 2014 annual conference that took place during the week of March 20, 2014 in Orlando, Florida. These larger alumni venues were utilized to inform and educate attending players on Settlement details and to provide one-on-one informational sessions to those who requested more information, or who had specific concerns regarding the Settlement. (*See statement of former NFLPA Board of Director Derrick Frost attached and marked as Exhibit K*). (*See statement of Joseph Pisarcik, former NFLAA President*) (*See Statement of Bart Oates, New York/New Jersey*

*NFLAA chapter president); (See Statement of John Haines, Austin, Texas NFLAA chapter president attached hereto and marked as exhibit L.)*

*National media exposure complemented PR campaign*

21. I utilized my media background to further influence press coverage of the litigation. Timely and relevant press releases utilizing persuasive quotes that were personally obtained from influential retired players were created and distributed through national newswire services, such as PR Newswire and the Associated Press. This path of distribution permitted each release to be distributed to media outlets locally, regionally and nationally. Many, if not all of the press releases that were created and distributed were prominently published in print, as well as appearing online on the websites of top level media organizations including, ABC News, The Washington Post, USA Today, NBC News, Associated Press, local and regional newspaper groups, online media groups, Fox News National and Syndicated Media Outlets, CBS News, as well as Business and Sports Journals throughout the top 50 media markets in the country. Quotes from high profile retired players were used in each release. Releases included, but were not limited to the following:

- a. More former NFL players file suit in Philadelphia (February 10, 2012).
- b. NFL concussion case alleges fraud & negligence against the League (January 2012)
- c. Super-bowl XXVI MVP and two-time Pro Bowler, Mark Rypien joins the concussion battle (March 28, 2012).
- d. Alex Karras, former NFL player and Webster television star joins fight against the NFL. (April 12, 2012)
- e. NFL concussion lawsuits keep adding former players (March 20, 2013).
- f. Detailing the concussion litigation against the NFL”, “More NFL lawsuits filed as players begin to take a stance (February 6, 2012).
- g. As NFL training camp begins, lawsuits continue to be filed (July 24, 2014).
- h. Judge’s Decision to Deny NFL Proposed Concussion Settlement Encourages Players (January 14, 2014)
- i.

*Playerinjury.com and real-time communication*

22. Given the fact that Retired NFL Players throughout the country had no readily available online resource to help educate them on the details of the Settlement, PlayerInjury.com was

revamped from a personal website owned by Mitnick Law Office to a website for educating the retired NFL player community. The site contained up-to-date status reports for retired players; Court documents as they were filed with the Court; Orders as they were released; frequently asked questions regarding the terms of the settlement agreement, as well as a live blog where retired players could opine on the Settlement and appeals. Additionally, the website provided informational materials for download for all retired players. (*See Playerinjury.com documentation attached as Exhibit M*).

23. With the ever-changing information needs and the rapidly growing interest in the Settlement terms, players needed a readily available website that they could access from their cell phones, as well as their computers that would provide each of them and their families with one centralized location to keep up with developments in the litigation; become educated about the litigation; read the opinions of other former players who posted on the blog and ask questions or have their concerns addressed. The formal website for the litigation, nflconcussionsettlement.com did not exist at the time.
24. Between September 1, 2013 and May 30, 2016, the site had 71,916 unique visitors and provided the personal opinions from over 120 Retired NFL Players. The Settlement information, news and player opinions that were published on playerinjury.com became an invaluable tool for the global Class. Many of the opinions and comments published by retired players were so instrumental that them were included as an Exhibit to Class Counsel's brief filed with the Court in support of the Settlement's final approval. (*See Class Counsel's brief in support of final Settlement approval*).

#### *Conclusion*

25. From the onset of the multidistrict litigation through the appellate process, I gave up most of my practice of law, as that time was necessary to accomplish the goals set forth in this Declaration. Prior to the litigation, I was personally responsible for generating hundreds of thousands of dollars in revenues to my firm each year. The large majority of those revenues were forgone during the course of the concussion litigation given the risk that I incurred to become involved and the degree of that involvement. To offset the burden of foregoing my regular revenue generating activity and to fund my office and the costs involved in pursuing the goals described in this Declaration, I was required to secure financing in excess of \$2,500,000 during the period from December 2013 until the present.

26. I do not know of any other direct communications, or similar efforts from attorneys involved in the litigation, that were able to distill the influx of misinformation that was spreading within the tight-knit retired player community. Misinformation was corrected with accurate information through the preparation and distribution of hard-copy literature, in-person presentations at large and small alumni chapter venues, as well as, personal one-on-one interactions with thousands of players. Correcting misinformation with accurate information curtailed the frustration that much of the player community was exhibiting.

27. Throughout my travels, I was not only forced to dispel much of the misinformation that was spreading among retired players, I found that hundreds of retired players and their spouses, some of who had filed suit and others that had not, had received no information at all with regard to the litigation, causing serious doubt about the proposed Settlement. Additionally, many players and their spouses were so uninformed that they believed that by endorsing the litigation, they would be perceived within their community as greedy. The stigma that existed early on in the litigation by the public “that no real correlation existed between concussions and long-term injury” and that “those retired players who were filing suit against the NFL were in it for a money grab” was still resonating with many players and their wives. It was apparent that educating these former players and their spouses about the history of the litigation was extremely important. Additionally, the validity of the entire subject matter, as well as having the retired players and their wives understand the legal obstacles that they faced including pre-emption, causation and the statute of limitations was critical to their endorsement of the Settlement and to the Settlement receiving final approval by the District Court.

28. My efforts throughout the litigation on behalf of the global Class of Plaintiffs have resulted in tremendous value to the plaintiff Class, their spouses and class counsel. Additionally, these efforts in large part, greatly helped catapult the unexpected passion within the Retired NFL Player Community in promoting concussion awareness. Retired NFL Players of all ages and backgrounds spoke out to the media, as well as to members of their own communities about the importance of player safety. This new-found passion by retired players was a major contributing factor in the fundamental change that has occurred in how the world now views the correlation between concussions and long-term injury. Children and athletes of all ages and skill sets are protected now more than even before. The

significant changes in medicine, science and law that have come about could not have materialized without the mass support of the Retired Player Community.

29. I respectfully ask the Court for an allocation of my time with a 3.55 multiplier

I declare under penalty of perjury, that the foregoing is true and correct.

By: /s/ *Craig R. Mitnick*

Craig R. Mitnick, Esquire

Mitnick Law Office, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing and supporting documents were served on all counsel of record via the Court's ECF system on October 27, 2017.

/s/ Craig R. Mitnick  
Mitnick Law Office, LLC

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Hon. Anita B. Brody

Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

Civ. Action No. 14-00029-AB

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**CO-LEAD CLASS COUNSEL ANAPOL WEISS'S PROPOSED ALTERNATIVE  
METHODOLOGY FOR THE ALLOCATION OF COMMON  
BENEFIT ATTORNEYS' FEES (ECF NO. 8447)**

Anapol Weiss ("Anapol") submits an alternative methodology for the allocation of the \$108,035,097.27 available for common benefit legal fees supported by Third Circuit precedent. Co-Lead Counsel Christopher Seeger's ("Seeger") methodology relying on a lodestar and a proposed multiplier is not. At bottom the allocation of legal fees for plaintiffs' counsel must consider a broad spectrum of risk evaluation, efficiency and competency rather than a straight-line mathematical computation. Anapol respectfully requests that this issue and all the submissions be referred to Magistrate Judge David R. Strawbridge or a Special Master, who can recommend a more equitable allocation, consistent with the applicable facts and law.

**I. THIRD CIRCUIT PRECEDENT MANDATES A MORE ROBUST METHODOLOGY THAN A SIMPLE MATHEMATICAL FORMULA**

In the Third Circuit, the relevant factors for allocation of common fund attorneys' fees include: 1) the size of the fund created; 2) the skill and efficiency of the attorneys involved; 3) the complexity and duration of the litigation; 4) the risk of non-payment; 5) the amount of time devoted to the case by Plaintiffs' counsel; and 6) any innovative terms of the settlement.<sup>1</sup> In re: Diet Drugs, 582 F. 3d 524, 541 (3<sup>rd</sup> Cir. 2009). In deciding how to allocate fees, "[w]hat is important is that the district court evaluate what class counsel actually did and how it benefitted the class." In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 342 (3d Cir 1998). A District Court should focus on the benefit to the class and not simply the amount of time expended. Id. For example, the Honorable John R. Padova recently reemphasized the "work-benefit-value" formula, restating that a common benefit fee allocation is obtained by weighing: 1) the risks borne by counsel; 2) counsel's leadership and other roles assumed; 3) the lodestar<sup>2</sup>; 4) the quality of the work performed; 5) contributions made; and 6) the magnitude and complexity of assignments executed, and the time and effort expended, by counsel. Glaberson v. Comcast Corp., Civ. A. No. 03-6604, Dkt. 673, at 9-10. (E.D. Pa. Oct. 26, 2016). The bedrock of any fee allocation is the reasonableness of that award vis-à-vis the efforts

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<sup>1</sup> While there are additional factors identified for the question of the overall reasonableness of class fees, these six (6) factors are the most relevant concerning the apportionment of fees. See generally In Re: Trans Union Corp. Priv. Litig., 2009 WL 4799954, at \*1 (N.D. Ill Dec. 9, 2009) order modified and remanded on other grounds, 629 F. 3d 741 (7<sup>th</sup> Cir. 2011) (adopting R&R allocating fees in accordance with factors used to determine total fee award).

<sup>2</sup> The Third Circuit, in reviewing an award of attorney's fees in a statutory fee shifting case (which, unlike this case, hinges on lodestar only), has recognized that hours expended are not always a fair measurement of the value of legal services, instead noting that the quality – synonymous with the efficiency – of attorney work is a necessary factor to consider. Prandini v. National Tea Company, 557 F.2d 1015, 1018 (3d Cir. 1977).



of each firm and their contribution to the benefits afforded the Class. See generally In re: FPI/Agretech Securities Litig., 105 F.3d 469, 474 (9<sup>th</sup> Cir. 1997).

District Court opinions from other circuits apply similar benchmarks. First, while considering both the time spent by counsel and the nature of counsel's work, courts recognize that "not all types of work are created equal." Turner v. Murphy Oil USA, Inc., 582 F. Supp 2d 797, 810 (E.D. La. 2008). The Turner court recognized, for instance, that attorney time spent administering a settlement, while important, must not be afforded the same weight as attorney time spent negotiating, achieving and defending a settlement. Id. at 810-811 ("[T]he hours spent by counsel after the approval of the settlement agreement did not aid in the creation of the settlement fund, and, as a result, the Court concludes that it cannot treat the hours spent by counsel in administering the settlement program on a par with the hours spent by counsel who helped create the settlement and Common Benefit Fund."). Attorney work that helped create the settlement and the Common Benefit Fund must be afforded greater weight than attorney work that did not.<sup>3</sup> "Apportionment is largely dependent on an analysis of the amount, nature, and significance of the work of each counsel and how it relates to the work of other counsel." Turner, 582 F. Supp. at 812.

Second, "allocation means proportion" – in other words, "how does the share lead counsel is taking compare to the share others are getting?" In re: Vitamins Antitrust Litig., 398 F. Supp. 2d 209, 234 (D.D.C. 2005). The allocation of fees among counsel must be "rationally related to each other." Id. And, a court's critical review of counsel's recommendations for an apportionment of fees is predicated upon "a fundamental exercise of trust by the Court." Id.

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<sup>3</sup> Courts also acknowledge the value and need to compensate counsel's efforts even before the inception of the MDL when those efforts have directly provided a common benefit. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 103736 (D. Minn.)

Accordingly, lead counsel must make a “fair allocation among its group even if that allocation diminished the share lead counsel received.” Id.

As discussed infra, the Seeger allocation lumps all attorney work together, without regard to benchmarks in the litigation. Nor does it appear that the proposed apportionment of attorney’s fee awards was rationally related to the respective work, rather than hours.<sup>4</sup> In that regard, we propose the Court establish benchmarks for each phase of the litigation (pre-complaint, post-complaint, negotiation of settlement, approval of settlement, defense of settlement, and administration of settlement), and then allocate the fee proportionally based on those benchmarks.

## **II. ANAPOL’S WORK BEFORE PRELIMINARY APPROVAL AND ITS WORK AS CO-LEAD SHOULD BE REASONABLY REFLECTED IN THE ALLOCATION**

While Anapol’s work covered the breadth of this litigation, involving work before and after preliminary approval of the Settlement, Anapol’s crucial role in the development of the core elements of this litigation - when the risk for non-payment was greatest - have been substantially undervalued. Given the importance of this work and the substantial risk borne by investing attorney time and money at such an uncertain stage, Anapol deserves a substantially higher allocation of the attorney’s fee award.

### **A. Anapol Undertook Substantial Risks and Performed Significant Tasks In The Five Months Prior To Filing The First Lawsuit In This MDL**

In 2011, Anapol was the first law firm to file an action in federal court against the NFL (“the Easterling matter”). Easterling v. NFL, 2:11-CV-05209-AB, Dkt. 1 (E.D. Pa.). Anapol’s

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<sup>4</sup> While Seeger and Anapol shared the role of *Co-Lead* Class Counsel, the Seeger firm’s proposed apportionment would leave one Co-Lead Class Counsel firm (Seeger) with 65.4% of the attorneys’ fees and the other (Anapol) with 4.3% of the attorneys’ fees. That is, the Seeger firm requests that this Court award it over 15 times the fees that it allocated to its Co-Lead Class Counsel, Anapol. On its face, Mr. Seeger’s proposed apportionment is grossly inequitable given, *inter alia*, Anapol’s extensive contributions to the case.

Senior Shareholders, Larry Coben and Sol Weiss, spent more than 1,000 hours on an extensive legal, factual and medical analyses before filing this national class action against the NFL.

Anapol analyzed available medical records and injury histories of approximately a dozen former NFL players whom Anapol was representing. Declaration of Larry Coben at 2 (attached hereto as Ex. 1). Mr. Coben analyzed these players recollections of the head injuries they suffered playing football. Id. In May 2011, Mr. Coben reviewed extensive medical literature to develop causative theories necessary to pursue substantive liability claims against the NFL. Id. at 3. Additionally, through the Summer of 2011, Mr. Coben interviewed former NFL players and their families. Id. at 3-4. These players suffered from varying degrees of dementia, ALS, and other medical conditions addressed by the Settlement. Id. Mr. Coben's unparalleled expertise in football helmet and closed head injury litigation provided pivotal insight and access to world class experts. Id. at 1-3. Anapol then formed a team of experts to explore: 1) the historical knowledge of the dangers of concussive events in sports; 2) the NFL's awareness and response to those dangers; 3) the causative relationship between both what are known as "sub-concussive" and "concussive" injuries in football (and other sports) and long-term neurocognitive medical disorders and behavioral dysfunctions; and 4) the available means to treat these long-term medical conditions. Id. at 3. Several of these experts continued to inform counsel after the MDL was formed and, one, Dr. Grant Iverson, was heavily relied on in creating the BAP Program. Id. at 3, 5, 8, 9. Others helped quantify injuries that later appeared in the Monetary Award Matrix. Id. at 10. These experts provided the primary medical opinions offered to and relied upon by the Court in approving the Settlement. Id. at 9-10.

**B. Anapol's Efforts In The Easterling Matter Between The Filing Of The Complaint And The Formation Of The MDL**

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Anapol filed the Easterling matter on August 17, 2011, which included several former NFL players and their respective families pursuing relief against the NFL. Id. at 4. Three of these former players had already been diagnosed with neurocognitive disorders while others suffered from post-concussion behavioral problems. Id. The Easterling matter was the *first* lawsuit filed against the NFL requesting a nationwide class for concussive injuries and neurocognitive disabilities. Id. The suit also sought certification of a medical monitoring class. Id. After the filing of the Easterling matter, Mr. Coben and Mr. Weiss discussed issues including a potential MDL with Beth Wilkinson of Paul, Weiss, Rifkind, Wharton & Garrison. Id. at 4. Both Mr. Weiss and Mr. Coben appeared before Judge Brody for a Pre-Trial Conference and discussed with the Court issues related to pre-trial discovery, motion practice, and the possibility of MDL litigation. Id. at 5.

On January 26, 2012, Mr. Weiss appeared before the Multi District Litigation Panel and successfully argued that the MDL be assigned to this Court. Id.

**C. Anapol's Leadership Role in the MDL Litigation Prior to, and During, the Settlement Negotiations**

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**1. Anapol's Role in the MDL Prior to the Settlement Negotiations**

Shortly after formal consolidation, Anapol convened a two-day meeting of Plaintiffs' counsel. Id. at 5. Anapol presented six (6) retained experts to discuss the range of medical and legal issues facing retired players who stepped forward to tackle the NFL. Id. These experts included: Professor William Rubenstein and attorney David Fredricks (legal hurdles in certifying a class, causation, preemption and duty); Dr. Thomas Genarelli (biomechanics causing head injuries in contact sports); Dr. Robert Cantu (a leading proponent that concussive and sub-

concussive hits cause TBI), Dr. Grant Iverson (using neuropsychology to quantify cognition deficits); and, Dr. Gregory O'Shanick (Ray Easterling's neurologist). Id. Anapol proposed, and the entire group agreed to, an organizational structure for the MDL litigation and the counsel to fill the various roles. Id. at 6. Those roles included Lead Counsel, an Executive Committee, and Plaintiffs' Steering Committee. Id. Judge Brody then selected Mr. Seeger as one lead counsel and the remaining lawyers selected Sol Weiss as co-lead counsel, an appointment that Judge Brody then confirmed. Id. Mr. Coben was one of six attorneys designated to serve on the Executive Committee. Id.

The Plaintiffs' attorneys in attendance at this organizational meeting also created a number of committees to perform common benefit work in the following areas: (1) Legal and Briefs Committee; (2) Discovery/Document responsibility Committee; (3) Third Party Discovery and Privilege Committee; (4) Expert/Science Committee; (5) Communications and Privilege Committee; (6) Riddell/Helmet Committee; (7) Lien Subrogation and Client Resolution Committee; and (8) State/Federal Counsel and Fact Sheet Committee. Id. Later in the MDL, a Negotiation Committee was also formed. Id.

Mr. Coben was designated as Co-Chair of both the Legal and Briefing Committees and the Expert/Science Committee. Id. On April 25, 2012, the Court adopted the Plaintiffs' proposed organizational structure. Id. The Court also set a deadline for the Master Administrative Complaint. Over the next 30 days, Mr. Coben and two other members of the Legal and Briefing Committee developed the factual and legal theories of liability that were integral to the ninety page Master Administrative Complaint. Id. After the Master Administrative Complaint was filed, Mr. Coben continued his work on the scientific and medical aspect of the claims against the NFL. Id. at 7. This work required Mr. Coben to expend hundreds of hours in meetings with

several of the key experts. Id. Mr. Coben identified and retained additional experts to assist with the litigation, including, nationally renowned brain injury experts Dr. David Hovda and Dr. Christopher Giza, who among other professional activities, served as the Director of Brain Injury Research Center, Department of Neurosurgery, David Geffen School of Medicine at UCLA and the Co-Chair of American Academy of Neurology Committee which published the Evidence-based Guidelines for Assessment and Acute Management of Sports Concussion in Children and Adults, respectively. Id. at 3, 7-8. Throughout the summer of 2012, Mr. Coben dedicated approximately one third of his working hours to develop scientific predicates for compensable injuries and to quantify neurocognitive loss. Id. at 7. Over the course of 2 years (2013 and 2014), Mr. Coben worked with Drs. Hovda and Giza, as well as two prominent brain injury experts in Florida (Drs. Hamilton and Fischer), who were referred to Coben by the Podhurst Firm to prepare their respective declarations for submission to the Court. Id. at 7-8. The declarations of Hovda, Hamilton, Fisher, and Giza aided the Court in finding that repetitive mild brain injury is associated with the Qualifying Diagnoses for levels 1.5 and 2 set out in the Settlement Agreement. Id. at 9; see also Final Order of Judgment at 69-70. These Declarations directly refuted the Objectors' claims that CTE can be diagnosed in a living person. Declaration of Larry Coben, at 9; see also Final Order of Judgment at 80-82.

Anapol also worked extensively with Dr. Grant Iverson in developing the neurocognitive definitions and the testing methods that would be employed to fairly verify a player's neurocognitive injury. Declaration of Larry Coben, at 8-10. As Dr. Iverson is a leading neuropsychologist on concussion injury his significant involvement helped shape the BAP Protocol. Id. at 8-9. Dr. Iverson interacted with Co-Lead Counsel's retained expert consultant, Dr. Kelip, on the efficacy of the overall plan for testing and evaluation of the players. Id. at 9.

Further, Mr. Coben was instrumental in working with Dr. Iverson and the other experts during the negotiation process, which was particularly useful in responding to the NFL's positions on scientific and medical matters. Id. at 8.

Additionally, Anapol (through Mr. Weiss) interviewed and hired CLS Strategies, a public relations firm, to assist Plaintiffs as the case progressed. Plaintiffs' public relations campaign overcame initial negative public sentiment toward the lawsuit. Declaration of Sol Weiss, at 1. (attached as Exhibit 2). Initially, surveys showed that the public believed that NFL players had received more than ample money during their careers such that they should not complain about their injuries. The Public Relations Committee (with Mr. Weiss co-leading this effort), focused on the devastation to retired players and their families who were previously unaware of the dangers of concussive and subconcussive hits in contact sports. Id. at 1-2. This resulted in a sea change in public sentiment providing additional leverage to militate against serious liability defenses. Id.

Anapol (through Mr. Weiss) also took the lead in developing a database of factual and medical information on over 2000 Retired NFL Players ("Retired NFL Players' Database"). Id. at 2. Anapol employees, with assistance from other law firms, conducted the numerous client interviews and medical records reviews which provided the information used to populate the database. Id. This database was shared with the actuaries and economists who created the parameters for the inception points and solvency of the original capped Monetary Award Fund. Id.

Anapol was instrumental in hiring David Frederick and his firm, Kellogg Huber, to assist the committee on briefing and arguing against federal preemption, a seminal defense in this litigation. Id. Mr. Weiss worked directly with Kellogg Huber attorneys in reviewing briefs and



attending mock oral arguments. Id. Prior to retaining Kellogg Huber, Anapol worked with the Legal Briefing Committee, which developed various drafts in response to the NFL's Motion to Dismiss. Declaration of Larry Coben, at 7.

Respectfully, as detailed below, each of these litigation activities must be reflected in any fee allocation. In re: Diet Drugs, 582 F. 3d at 541 (a court may look to the duration of the litigation, the time expended by counsel, and the risk of non-payment in adjudicating fee petitions); Comcast, Civ. A. No. 03-6604, Dkt. 673, at 9-10. (in adjudicating fee allocations, courts may consider, inter alia, the risks borne by counsel, counsel's contributions, the time expended, and "the magnitude and complexity of assignments executed").

## **2. Anapol's Efforts During Settlement Negotiations**

Mr. Seeger, in both his Declaration and in the Petition for Approval of Fees, emphasized the following aspects of the Settlement: (1) the BAP Program; (2) the innovativeness of the Monetary Award Matrix (primarily as it awards different amounts to different injuries in the retired NFL Players); and (3) the extensive retired NFL Player Database (in essence an epidemiological study of the Class Members and their myriad ailments). Anapol played a pivotal role in all three of these essential drivers of the settlement.

By taking a leading role in the scientific and medical issues on causation, and a primary role in developing the legal theories of liability, on Public Relations and in generating the NFL Retired Player database, Anapol was at the forefront on setting the settlement table. This work took place when the contingent risk was the greatest. The BAP and the Monetary Award Fund undergirded the settlement.

The settlement negotiations, which began in January 2013, were lengthy and complex, and ultimately assisted by Judge Layne Phillips at the instruction of this Court. Mr. Weiss was a



member of the Negotiating Committee, spending considerable time and effort. As Mr. Seeger acknowledges, the negotiation team – including Mr. Weiss – worked at a grueling pace, collectively expended thousands of hours on the settlement, and often worked around the clock to negotiate this historic settlement. Declaration of Christopher Seeger, Dkt. 7151-2, at 10. Mr. Weiss played a pivotal role, as Co-Lead Class Counsel, in the negotiations and in reviewing the numerous drafts of the Settlement Agreement. Mr. Weiss, along with the other members of the negotiating team, finally agreed on a settlement for the class and a settlement agreement that appropriately memorialized it. Relatedly, Mr. Coben, along with Mr. Weiss and Mr. Buchanan (the latter of the Seeger firm) took the lead in negotiating the tests incorporated into the BAP.

Mr. Seeger, in his Declaration, lists a number of tasks that were instrumental in the negotiating process, for which Anapol was either heavily engaged. These tasks included:

- 1) Researching the medical and scientific issues implicated by Plaintiffs’ claims, including:
  - a. the science of concussions and subconcussive head trauma and the medical conditions associated with such injuries;
  - b. the neurocognitive and neuromuscular injuries and progression of disease associated with such brain injuries;
  - c. the epidemiology of the Qualifying Diagnoses and the methods of diagnosing and treating the Qualifying Diagnoses;
  - d. guidance by medical and scientific experts in conducting a comprehensive review of peer reviewed medical literature; and
- 2) Creating the Retired NFL Players database, which Mr. Seeger acknowledges “required extensive professional work” and was “vitally important to the entire negotiation process.”

Declaration of Christopher Seeger, Dkt. 7151-2, at 11.

In addition, Anapol – through the efforts of Mr. Weiss and Mr. Coben - worked extensively with Mr. Seeger and other members of the negotiating team through the execution of

the Settlement Agreement. As discussed earlier, Mr. Coben worked with the experts to respond to the NFL's various legal, medical and scientific negotiation points during settlement, and relayed those responses to the negotiating team through Mr. Weiss. The innovative and fundamental elements of the settlement agreement – the BAP and the Monetary Award Matrix – involved substantial input from Anapol lawyers, support staff and the experts it hired for the Class.

Anapol thus took an outsized role in the MDL both before and during the settlement negotiations. Anapol's leadership efforts and extensive work with respect to the BAP, Award Matrix, and Player Database were highly demanding and played a critical role in the settlement discussions and the ultimate relief afforded the class. Meanwhile, Mr. Weiss's and Mr. Coben's roles in the negotiation discussions themselves were critically important. Consistent with Diet Drugs and Comcast, the fee allocation should accurately reflect Anapol's work on the MDL both before and during settlement negotiations, namely by weighing: (1) the extensive time expended by Anapol; (2) the legal and scientifically complex nature of Anapol's work both during the negotiations themselves (e.g., attending settlement discussions) and in support thereof (e.g., creating the scientific and legal bases for the Settlement and Anapol's leadership roles in the MDL more generally); and (3) the manner in which those efforts led to and were reflected in the ultimate settlement, a settlement which in large part incorporates Anapol's ground-breaking legal/scientific work with their panel of top tier experts. See In re: Diet Drugs, 582 F. 3d at 541; Comcast, Civ. A. No. 03-6604, Dkt. 673, at 9-10.

**D. Anapol Should Be Credited For the Efficiency And Effectiveness of Its Work**

Not only did the Anapol firm provide instrumental work on the case and the ultimate Settlement, but the work performed by its attorneys was done with the utmost efficiency and



### III. THE FLAWED LODESTAR ANALYSIS: GROSS DISPARITIES IN HOURLY RATES LEAD TO GROSS DISPARITIES IN ALLOCATION

The lodestar factor becomes a secondary and non-essential element in the “what counsel did and how it benefitted the class” analysis. Not all attorney work built into the lodestar is created equally, which is why the lodestar is only one of a number of factors considered when allocating fees among counsel.

Mr. Seeger’s recommended allocation is flawed in that there exists a superficially large delta between Anapol’s lodestar and that of firms, like the Seeger firm, that assert high billing rates. Sol Weiss and Larry Coben, both partners at the Anapol firm with decades of personal injury and mass tort experience, submitted billing rates of \$650 an hour. The Seeger firm’s rates range from \$500 and \$600 for a *contract attorney and an associate*, respectively, to between \$895<sup>7</sup> and \$985 for the Seeger firm’s most active partners in this litigation. This large delta, which reflects neither the skill, efficiency, quality of work, nor risk taken on by each law firm, fundamentally skews Mr. Seeger’s analysis.<sup>8</sup> There is no equitable or legal reason that the delta between the proposed allocation to Anapol and that to the Seeger firm should be related to the superficially large difference between these firms’ nominal billing rates.

<sup>7</sup> Ms. Benedetto, a Seeger partner, seeks an hourly rate of \$895 here. Three years ago, before this Court, Ms. Benedetto requested an hourly rate of \$465. McDonough v. Toys R Us, Inc., 2:06-cv-00242, E.D. Pa., Dkt. 863-2, at 25. Fellow Seeger partner Jonathan Shub requests a rate of \$750 here. In the Toys R Us case, his hourly rate was said to be \$495 per hour. Id.

<sup>8</sup> As Mr. Seeger noted in Class Counsel’s Fee Petition of February 23, 2017, a percentage of the fund approach is appropriate in common fund cases such as this. Fee Petition Brief, Dkt. No. 7151, p. 27-29; see also, e.g. In re: Diet Drugs, 1203, 2002 WL 32154197, at \*10 (E.D. Pa. Oct. 3, 2002) (subsequent history omitted) (“The day of the lodestar has passed in class actions such as this, save for perhaps its use as a cross-check in some cases. It is now clear that in the Third Circuit the percentage of recovery method should be utilized in common fund.”) (internal citations omitted).

In fact, Professor Brian Fitzpatrick, who provides a Declaration in support of Mr. Seeger’s fee, petition has taken the position that the lodestar framework has no place in cases involving a percentage of the fund award. In Re: Volkswagen, 3:15-md-02672-CRB, N.D. Cal., Dkt. 2175-2, at p. 7-17. (“[T]he lodestar approach [has fallen] out of favor in common fund class actions. . . . [I]n my opinion, it does more harm than good to consider class counsel’s lodestar when awarding fees under the percent method.”).

To the extent a lodestar crosscheck must be employed, this Court should employ a uniform hourly rate scale applicable to all Class Counsel firms, reflecting the years of experience of each associate, partner, of counsel, or contract attorney who has worked on the case. This approach is mandated by the objectively reasonable standard employed by the Third Circuit to determine an hourly rate, which hinges on *reasonable geographic market rates for comparable work, not the attorneys' personal claimed rate*. See Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 199 (3d Cir. 2000) (“[A] court determines the lodestar by multiplying the number of hours counsel reasonably worked on a client’s case by a reasonable hourly billing rate for such services in a given geographical area provided by a lawyer of comparable experience.”).<sup>9</sup> In that respect, the Court can level the playing field and ensure that superficial disparities in hourly rates do not lead to an inequitable distribution of the fee award. To hold otherwise would violate Gunter and reward law firms, not for the quality of their work or contribution to the Settlement, but for their ability to demand high hourly rates.

#### IV. CONCLUSION

For the reasons set forth above, Anapol requests that this Court decline to accept Mr. Seeger’s proposed fee allocation and refer the matter to a Magistrate Judge or Special Master to employ a more equitable and appropriate value-added method of fee allocation, in accordance with Third Circuit precedent.

PIETRAGALLO GORDON ALFANO  
BOSICK & RASPANTI, LLP

By: /s/ Gaetan J. Alfano, Esquire  
GAETAN J. ALFANO, ESQUIRE  
I.D. No. 32971  
1818 Market Street

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<sup>9</sup> That is, a mass tort attorney with the same years of experience in this litigation should, to the extent the lodestar is considered, be provided an identical hourly rate in computing the lodestar.

Suite 3402  
Philadelphia, PA 19103  
(215) 320-6200

Dated: October 27, 2017

*Attorney for Anapol Weiss*

3478668v1

# EXHIBIT 1

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Hon. Anita B. Brody

Plaintiffs,

v.

National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

Civ. Action No. 14-00029-AB

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**Declaration of Larry E. Coben, Esq.**

I, Larry E. Coben, Esquire, declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am an attorney at law, admitted to practice in the Commonwealth of Pennsylvania, the State of Arizona and the associated Federal Courts in those Circuits. I have also been admitted to the United States Supreme Court and Pro Hac in many states across the country.
2. Over the course of my career, I have litigated hundreds of sports head and spinal cord injury cases for players and their families.
3. I have published in legal peer review journals dozens of papers regarding head and spinal cord injury in sports activities and I have lectured on these topics at legal seminars and law school programs across the country.







compensation vis a vis the NFL Player Benefit Plans but had all been rejected. Fee agreements were signed and many of these players were included in the first lawsuit we filed in this Court in August 2011.

14. On August 17, 2011, as the result of the work that I and members of my Firm did over the proceeding four and half months, which probably involved more than 1,000 hours of work with former players, nationally renowned experts and detailed fact and legal analyses, we filed the case captioned Easterling, et al v. National Football League, Inc.
15. The Easterling case included seven former NFL players and their respective families. Three of these former players had already been diagnosed with neurocognitive disorders and others were suffering with post-concussion behavior problems. Because this lawsuit included former MVP Jim McMahon who led the Chicago Bears to the Super Bowl, the lawsuit generated significant publicity.
16. The Easterling case was the first lawsuit filed by former players and their families against the NFL seeking national Class Action status related to concussive injuries and their neuro-cognitive disabilities. This lawsuit also sought the establishment of a Medical Monitoring class.
17. The Easterling case was assigned to the Honorable Anita B. Brody, who then first scheduled a Pre-Trial Conference for November 8, 2011.
18. Before the scheduled Conference, I and my partner Sol Weiss began discussions with counsel for the NFL, Beth Wilkinson of Paul, Weiss, Rifkind, Wharton & Garrison, and we entered into a Stipulation to postpone certain filings until shortly before the Conference date.

19. This Honorable Court held a Pre-Trial Conference on the Easterling case on November 21, 2011. Both I and my partner Sol Weiss appeared for our clients. The NFL was represented by several attorneys including Ms. Wilkinson and Brad Karp, also of Paul, Weiss, Rifkind, Wharton & Garrison.
20. During this Conference, the parties proposed a case schedule and then discussed with the Court issues related to: pre-trial discovery, motion practice to challenge the propriety of the lawsuit and the possibility that this case would lead to filing a request for Multi-District litigation because of a number of “copy-cat” lawsuits filed during the months of September through November. The parties inquired and the Court agreed that the Court would be willing to accept an MDL assignment of this litigation.
21. On January 26, 2012, my partner Sol Weiss and I appeared and argued for the assignment of this case as an MDL to this Honorable Court. That assignment was made.
22. After the assignment of this case as an MDL to this Honorable Court, I and my partner Sol Weiss organized a meeting of the primary attorneys from across the United States in an effort to coordinate the MDL activities of the Plaintiffs.
23. A meeting of plaintiffs’ counsel was held for two days in our offices in Philadelphia. We arranged for 6 experts to attend and lay out a host of medical and legal issues that we expected to face in this lawsuit. Those experts included Professor William Rubenstein, David Fredrick, Esquire, Dr. Thomas Genarelli, Dr. Robert Cantu, Dr. Grant Iverson, and Dr. Gregory O’Shanick.

24. At the meeting, as the organizer of plaintiffs' counsel, we proposed and the entire group agreed to an organizational structure—to propose to the Court—for lead counsel, an Executive Committee and a Plaintiffs' Steering Committee. Sol Weiss was designated as lead counsel and I was designated as one of six attorneys to serve on the Executive Committee.
25. The plaintiffs' attorneys at this same meeting created a host of committees to perform common benefit work in the following areas of interest and concern: (a) Legal and Briefing Committee, (b) Discovery/Document Repository Committee, (c) Third Party Discovery and Privilege Committee, (d) Experts/Science Committee, (e) Communications and Ethics Committee, (f) Riddell/Helmet Committee, (g) Lien Subrogation and Client Resolution Committee, and (h) State/Federal Counsel and Fact Sheet Committee. A Negotiation Committee was formed later in the litigation.
26. I was designated as Co-Chair of the Legal and Briefing Committee and the Experts/Science Committee.
27. On April 25, 2012, this Honorable Court held an Organizational Conference, at which time the Court approved of Plaintiffs' attorneys' requested leadership committees.
28. During this same Hearing, the Court set a deadline to file the Master Administrative Complaint.
29. Over the next 30 days, I and two other members of the Legal and Briefing Committee developed the facts and legal theories of liability that were then constructed into the 90 page Master Administrative Complaint.

30. Once the Master Complaint was filed, I began working further on the scientific and medical aspects of the claims against the NFL. This work involved hundreds of hours of meetings with several of the key experts who would ultimately prepare separate Declarations used to support the Plaintiffs' Motion to approve the Settlement of this case.
31. During the months of September and October, the Legal Briefing Committee under my leadership worked on draft briefs in response to the NFL's Motion for Dismissal based on federal preemption. This legal work was then used and/or incorporated into the Plaintiffs' Brief in Opposition to the NFL's Motion to Dismiss.
32. After oral argument on the issue of preemption, the Court directed the litigants to explore the settlement of this case.
33. Over the next few months, I personally attended many of these meetings and provided input into these discussions. However, more of my time was spent working with the nationally renowned experts we hired to develop proposed damage models which were used by Lead Counsel in their discussions with the NFL over the terms of the settlement and the value of these cases.
34. During the summer of 2012, I spent about one-third of my working hours either on a plane traveling to meet with our key experts or sitting in their respective offices developing the scope of the supportive opinions which became the product of their Declarations and/or the Medical Monitoring Platform adopted as the BAP.
35. During calendar years 2012 through the first part of 2014, I personally met and/or worked by phone with these four experts and helped draft the Declarations submitted by each to the Court: (1) Dr. David Hovda (who has been the Director of the UCLA

Brain Injury Research Center — he was misidentified by Mr. Seeger in his filing as a neurosurgeon, which he is not), (2) Dr. Christopher Giza (misidentified by Mr. Seeger as a neuropsychiatrist) who is a Board Certified Neurologist and the Co-Chair of the American Academy of Neurology’s Committee on Assessment and Acute Management of Sports Concussions in Children and Adults, (3) Dr. Kenneth C. Fischer (Board Certified in Psychiatry and Neurology) and (4) Dr. Richard Hamilton (Neuropsychologist).

36. In the development of the Medical Monitoring and Testing Plan proposed and adopted as the BAP, I hired and met with and spoke with Dr. Grant Iverson for more than 100 hours. I flew to his home in Vancouver, Canada and worked with him in the development of the neuro-cognitive definitions and the testing methods to be employed to fairly verify a player’s neurocognitive injury. While Dr. Iverson did not provide a Declaration, if it were not for Dr. Iverson’s stature and input, it is unlikely the BAP protocol would have been acceptable to the NFL. He is one of the leading neuro-psychologists on concussion injury currently working in the United States. Dr. Iverson moved his practice from Vancouver to Boston, Mass., when he took a position at the Harvard Medical School in late 2012.
37. During the time spent with Dr. Iverson, he developed several drafts of a “Health Monitoring Program” which I personally studied and reviewed with my partner Sol Weiss. These drafts provided significant scientific information pertinent to what became the BAP test protocol incorporated into the Settlement Agreement. It is my understanding that this information was used by Mr. Weiss and others on the Negotiating Team with the NFL. My work with Dr. Iverson continued until the Fall

of 2014. Sometime before the Plaintiffs submitted their motion to obtain approval of the Settlement, Dr. Iverson began to interact directly with co-lead counsel's hired expert consultant (Dr. Kelip), who then finalized the testing protocol which became the BAP protocol incorporated into the Settlement Agreement.

38. As drafts and revised drafts of the BAP test protocol were proposed and counter-proposed by the parties during negotiations, I remained involved in discussing these revisions with Dr. Iverson.

39. In the Fall of 2014, leading up to the filing of the Plaintiffs' Brief in support of the Motion for an Order Granting Final Approval of the Settlement and Certification of Class and Subclass, I worked with Drs. Hovda and Giza to address the propriety of the BAP and Monetary Grid and to provide a detailed response to the Declarations submitted by the Objectors' experts. This interaction led to the Declarations of Dr. Hovda and Dr. Giza which were submitted to the Court.

40. The development and presentation of the Declarations submitted by Drs. Hovda, Giza, Hamilton, and Fischer were the primary scientific predicate for this Court's decision that repetitive mild brain injury is associated with the Qualifying Diagnosis set forth in the Settlement Agreement. [Final Order of Judgment, at 69-70.] These Declarations were also the predicate for the Court's rejection of objector claims that CTE is causative from concussions or diagnosable in a living person. [Final Order of Judgment at 80-82.] The Court also relied upon these Declarations to conclude that concussions and traumatic brain injury with associated sequelae such as dementia, Alzheimer's Disease and Parkinson's Disease. [Final Order of Judgment at 100.]



41. The Opinion of this Court relied heavily on these Declarations which I alone personally assisted Drs. Hovda and Giza prepare. [See, Final Order of Judgment.]


42. I was the only member of the Plaintiffs' team that met with and assisted Dr. Hovda and Dr. Giza to prepare their Declarations.

43. I was the member of the Plaintiffs' team that first spoke with and helped draft  
Declarations for Drs. Hamilton and Fischer.

44. The insight provided by the various experts described above was used to quantify the injuries that were ultimately included in the Monetary Award Matrix.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2017 in Scottsdale, Arizona.

  
Larry E. Coben, Esq.

# EXHIBIT 2

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION**

**No. 2:12-md-02323-AB**

MDL No. 2323

**Kevin Turner and Shawn Wooden,**  
*on behalf of themselves and  
others similarly situated,*

**Hon. Anita B. Brody**

**Plaintiffs,**

V.

**National Football League and  
NFL Properties LLC,  
successor-in-interest to  
NFL Properties, Inc.,**

### Defendants.

**Civ. Action No. 14-00029-AB**

**THIS DOCUMENT RELATES TO:  
ALL ACTIONS**

### SUPPLEMENTAL DECLARATION OF SOL H. WEISS, ESQUIRE

I, Sol H. Weiss, Esquire, declare as follows, pursuant to 28 U.S.C. § 1746:

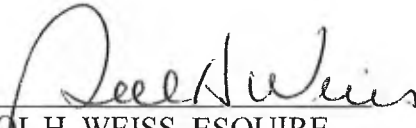
1. I am President of Anapol Weiss. I submit this supplemental declaration in support of Anapol Weiss's Co-Lead Class Counsel's Petition for an Alternative Allocation of Common Benefit Fees.
2. I took a leading role in the organization of the Plaintiffs' Steering Committee (PSC) and Plaintiffs' Executive Committee (PEC). I organized meetings and initiated communication (conference calls and emails) among PSC and PEC members
3. I was instrumental in creating and participated in the Public Relations and Legal and Briefing Committees. For public relations, I interviewed and retained the firm now known as CLS Strategies that shaped a campaign that featured retired players and their families rather than lawyers. This campaign changed the initial public perception that football players make a lot of money and should not sue the NFL. Sometime thereafter an ESPN Poll, found 70% of

- 2

experts as well as the NFL's experts. I reviewed and suggested changes to each draft of the various Settlement Agreements. I, along with Larry Coben, met with and prepared scientists and physicians who submitted Declarations on CTE issues and neurocognitive disorders.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2017 in Philadelphia, Pennsylvania.

  
\_\_\_\_\_  
SAUL H. WEISS, ESQUIRE

3475916-v1

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

|                                                                                                                                   |   |                             |
|-----------------------------------------------------------------------------------------------------------------------------------|---|-----------------------------|
| <hr style="border: 0.5px solid black;"/> <div>IN RE: NATIONAL FOOTBALL<br/>LEAGUE PLAYERS' CONCUSSION<br/>INJURY LITIGATION</div> | : | No. 2:12-md-02323-AB        |
|                                                                                                                                   | : | MDL No. 2323                |
|                                                                                                                                   | : |                             |
| Kevin Turner and Shawn Wooden,<br>On behalf of themselves and<br>Others similarly situated,                                       | : | Hon. Anita B. Brody         |
|                                                                                                                                   | : |                             |
| Plaintiffs,                                                                                                                       | : |                             |
| v.                                                                                                                                | : | Civ. Action No. 14-00029-AB |
| National Football League and<br>NFL Properties LLC, successor-in-interest to<br>NFL Properties, Inc.,                             | : |                             |
|                                                                                                                                   | : |                             |
| Defendants.                                                                                                                       | : |                             |

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

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**DECLARATION OF GENE LOCKS, CLASS COUNSEL, IN RESPONSE TO THE  
DECLARATION OF CHRISTOPHER A. SEEGER IN SUPPORT OF PROPOSED  
ALLOCATION OF COMMON BENEFIT ATTORNEYS' FEES, PAYMENT OF  
COMMON BENEFIT EXPENSES, AND PAYMENT OF CASE CONTRIBUTION  
AWARDS TO CLASS REPRESENTATIVES**

I, GENE LOCKS, declare under oath, based upon my personal knowledge, information and belief as follows:

1. I have been a practicing attorney for fifty-five years and have been a pioneer and in the forefront of personal injury mass tort litigation for the past forty years.

## INTRODUCTION

2. With this Declaration, the Locks Law Firm (“LLF”) objects to the purported allocation of Christopher A. Seeger (“Seeger”) in his Declaration (hereinafter the “Seeger Declaration”) for the following reasons:

A. Seeger’s method and procedure are a self-serving violation of the jurisprudence set forth in numerous cases by the Court of Appeals for the Third Circuit. Those cases command that the leadership collectively (not individually), or an independent auditor, must sort through, deliberate about, and come to an agreement about (i) the criteria used for the allocation of common benefit fees; (ii) the proper application of the criteria and (iii) the allocation itself. This “herculean” task should be shouldered by all the leadership, not just by one person, before they submit a recommendation to the Court. Here, Seeger did none of that, and the result is a self-serving purported allocation that ignores many contributions other than his own and that of his co-counsel, Arnold Levin.

B. Rather, the Court should order the leadership (all class counsel and possibly the entire Plaintiffs Steering Committee) to shoulder the difficult work of coming up with an allocation that properly recognizes contributions, applies reasonable criteria for doing so, arrives at loadstar figures for each applicant, and applies multipliers that are reasonable (though possibly subject to dispute). This way, the Court will receive an allocation that the leadership at least attempted to construct in a deliberative and fair process, perhaps subject to further review by an independent Auditor or Court designee. Seeger did not even make an attempt to do that here.

C. Further, awarding common benefit fees at this juncture in the case is premature. Seeger proposes to pay himself and Levin \$82 million before there is any real data about the

success or failure of the claims processing in this Settlement. Jurisprudence nationwide in similar mega-cases shows that courts cannot know whether a settlement has actually conveyed common benefit to the class until there is sufficient data to prove it. Courts do not allow common benefit fees before reliable data is accumulated and known to the court and parties. Seeger has been involved in many of these cases, including the *Vioxx* matter, so he knows the cases and knows the process. But here, Seeger appears eager to evade the data-gathering that would support or undercut his common benefit fee application and in order to receive enormous sums for himself and Levin, before any but a small amount of players receive monetary awards. This is contrary to the careful way courts and attorneys assess the value of a mega-case settlement and a subsequent award of common benefit fees

D. The Seeger allocation negatively affected virtually every law firm other than Seeger's and its co-counsel, Levin. Specifically, it negatively affected LLF in numerous ways more fulsomely described later in this Declaration. By way of example only, Seeger ignored virtually everything LLF did in the case, including its pre-MDL efforts, its negotiation efforts, its construction of the player injury database for negotiation purposes, and the fact that it represents and has always represented more retired players than any other firm.<sup>1</sup> A telling fact is that although LLF has been on the Court-appointed PEC from the beginning of this case and also has been class counsel from 2013 onward, Seeger has given LLF a multiplier equivalent to firms that were late to the case or barely participated at all. For the reasons set forth in this Declaration, without the claim filings by LLF, there likely would have been no Settlement. Seeger appears to have no recollection of this.

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<sup>1</sup> LLF represented 1400 retired players during negotiations in 2013, whereas Seeger and Levin together represented no more than a dozen.



E. Beyond his and Levin's \$80 million plus request, Seeger also seeks additional common benefit fees in the form of 5% of every monetary award granted to retired players. He seeks the additional fees to finance what he claims to be the cost of administering the Settlement Agreement. He has allocated that task to lawyers in his firm alone who, along with NFL counsel, are currently micro-managing every nuance of the Settlement, racking up hours and costs, and preventing the expert Claims Administrator BrownGreer from doing its job. On that level, this is another exorbitant self-serving request, particularly in light of the fact that Seeger has excluded Class counsel from almost every aspect of the administration process and made the process opaque.

F. Moreover, the requested 5% holdback is unnecessary. LLF urges the Court not to grant the request but, rather, (1) to allocate from the \$112.5 million fund a reserve for whatever is needed for administration; (2) audit Seeger's and the NFL's micromanagement of the Settlement process with the help of class counsel, BrownGreer, and a special master, if necessary, and (3) wait and see whether additional funds are ever needed for the administration of the Settlement which are not presently available. If additional funds are needed, the NFL should pay them, not the claimants.

**SEEGER'S ALLOCATION DECLARATION UTILIZES A METHODOLOGY  
NOT CONSISTENT WITH THIRD CIRCUIT JURISPRUDENCE**

3. Pursuant to the Court's directive, co-lead Counsel, Christopher A. Seeger, filed the the Seeger Declaration on October 10, 2017 and recommended an allocation of the common benefit fees. Using a traditional "lodestar methodology" to perform the proffered allocation, he recommended that his law firm receive 65.36 percent of the requested \$107,735,097.00 aggregate fee award even though his firm only claimed to have performed (allegedly) 45.74

percent of the lodestar value of the work and even though a significant percentage of that work was performed by attorneys who were paid a small fraction of the hourly rate claimed for their services. For the reasons that follow, we respectfully submit, the Court cannot rely on Seeger's recommendation in allocating whatever award it determines is appropriate herein.

4. First, allocation based on the recommendation of lead counsel ignores the prevailing methodology for distributing an award of class action attorneys' fees. Unlike the aggregate award of attorneys' fees from a class settlement fund itself, the allocation of such an award among those attorneys entitled to share therein is properly viewed as a "private matter" that does not require independent determination by the Court. As our Court of Appeals stated in *Warfarin*:

Appellant ... also contests the District Court's fee award on the grounds that it exacerbated the intraclass conflict between consumers and T[hird] P[arty] P[ayor]s. The District Court set aside 22.5% of the total \$44 million settlement fund to cover attorneys fees to be divided according to the discretion of the co-chairs of the Executive Committee. **The District Court dismissed objections lodged against the award as unpersuasive, explaining that the distribution of an attorney fee award among counsel is and should be a "private matter" for the attorneys to resolve amongst themselves.** [Appellant] renews his arguments here, essentially asserting that consumer counsel would have had an incentive to win a larger settlement for their clients if their share of the fees were directly linked to their clients' recovery. Because we find that the class was properly certified, and the Executive Committee structure adequately represented the interests of all class members in the settlement negotiations, **we see no reason to treat TPP and consumer counsel as antagonistic constituencies within the settlement class and deviate from the accepted practice of allowing counsel to apportion fees amongst themselves.**

*Warfarin*, 391 F.3d at 533 n.15 (citations omitted and emphasis supplied). *Accord, e.g., Bowling v. Pfizer, Inc.*, 102 F.3d 777, 781 (6th Cir. 1996) ("How ... class counsel ultimately divide that [court- awarded] fee" is up to them); *Longden v. Sunderman*, 979 F.2d 1095, 1101 (5th Cir. 1992) ("The district court acted well within its discretion in awarding an aggregate sum to the ... Attorneys that was based on their collective efforts, leaving apportionment of that sum up to the ... Attorneys themselves."); *In re Domestic Air Transportation*, 148 F.R.D. 297, 357 (N.D. Ga.

2013) (“Ideally, allocation is a private matter to be handled among class counsel.”); *In re Copley Pharmaceutical, Inc., Albuterol Products Liability Litigation*, 50 F. Supp. 2d 1141, 1148 (D. Wyo. 1999) (court prefers that class counsel handle allocation as a “private matter”).

5. The prospect of multiple applicants trying to reach agreement on the percentage allocation of a potential nine-figure award may seem daunting, but this process has succeeded in cases involving four times as many applicants for aggregate awards that were six times as much as the fee requested here. *See, e.g., In re Diet Drugs*, 553 F.Supp.2d 442, 460-61 (E.D.Pa. 2008). And the effort is well worth making because, if successful, it saves the Court the “difficult”, “unenviable”, “herculean” task of undertaking an allocation on its own. *See, e.g., Diet Drugs*, 401 F.3d at 167 (Ambro, J. concurring) (“The District Court described the task of allocating \$160 million in counsel fees as ‘herculean.’ ... This description was apt.”); *Prudential*, 148 F.3d at 329 n.96 (describing “the difficult task of assessing counsels’ relative contributions”); *Copley*, 50 F. Supp. 2d at 1148 (“Attorney fee allocation is an unenviable task for any court. It is a difficult matter that ... even the trial court is often not in the best position to decide.”); Curtis, D. & Resnick, J., “*Contingency Fees in Mass Torts: Access, Risk, and The Provision of Legal Services When Layers of Lawyers Work For Individuals and Collectives of Clients*,” 47 DEPAUL L. Rev. 425, 448-49 (Winter 1998) (noting the difficulty of “assessing the value of contributions of a multitude of attorneys to a particular outcome”).

6. Here, the Court did not request and Seeger did not even attempt to negotiate the allocation of a hoped-for fee that reaches into the nine-figure range. The failure to do is certain to result in acrimonious allocation litigation and appeals that could be avoided by following the well-accepted practice of good faith, arms-length negotiation among those who collectively labored to produce the Settlement that created the opportunity for the fee award. Respectfully,

the Court should overrule the allocation recommendation contained in the Seeger Declaration and direct Seeger and all the other fee applicants to engage in negotiations.

7. Second, while there are older, scattered cases that suggest it is appropriate for a district court to substantially rely on allocation recommendations of counsel occupying a leadership role in MDL class litigation, that line of cases was strongly rejected by Judge Ambro in a concurring opinion in the *Diet Drugs* litigation where he offered much needed appellate “guidance on how fees should be allocated among counsel in MDL class actions.” *See In re Diet Drugs*, 401 F.2d 143, 167 (3rd Cir. 2005). In that opinion Judge Ambro emphasized that when a district court asks MDL leadership to “suggest[]...how to proceed on matters near and dear – dividing a limited fund among themselves and other firms” it creates a “direct conflict of interest” akin to asking a “fox [to] recommend[] how to divvy up the chickens.” *Id.* at 173. “Such a direct conflict of interest” Judge Ambro observed, “strongly suggests that affording substantial deference [to the allocation recommendation of such lead counsel] is inappropriate.”

8. Far and away Seeger’s firm has the largest claimed lodestar in the present litigation. He obviously has an enormous direct financial interest in how any fee award made by the Court is to be allocated among the twenty-six attorneys who are entitled to participate in the aggregate common benefit fee award. Given this open and obvious conflict,<sup>2</sup> it is apparent that the Court may not substantially rely on his recommended allocation as a matter of law and should opt, instead, for neutral allocation procedure such as allocation by agreement or, if necessary,

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<sup>2</sup> As an example of this obvious conflict for allocation purposes, Seeger afforded the time devoted to Settlement, an activity that he was involved in, substantially greater weight than the time devoted to developing the class claims at the outset of the litigation, an activity that he was not involved in, even though it is obvious that there would have been no settlement if class claims were not conceived of, filed and aggressively maintained in the first instance.

allocation by a neutral judicial officer such as a magistrate judge, special master or an Article III judge using appropriate legal standards and based on a full evidentiary record.

9. Third, the allocation methodology proposed in the Seeger Declaration was not properly applied as a matter of law. While the fee application here properly abjures reliance on the lodestar method for awarding an aggregate fee in favor of the percentage-of-the-fund methodology,<sup>3</sup> the Seeger Declaration nonetheless assumes that the Court will award the requested aggregate amount and utilizes the lodestar method for allocation, multiplying self-reported lodestar values for each fee applicant times differential multiples ranging from a low of 0.75 to a high of 3.885 for Seeger's firm. *See* Seeger Declaration at ¶ 17. For the Court to follow this methodology would be plain error.

10. In the lodestar method, "the court multiplies the number of hours that ... counsel reasonably worked by the reasonable hourly rate for that work to determine the counsel's lodestar," which may be multiplied by a factor "that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Cendant Corp. Sec. Litig.* ("Cendant I"), 404 F.3d 173, 188 (3rd Cir. 2005). *In re Rite Aid Securities Litig.*, 396

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<sup>3</sup> Attorneys' fees are typically assessed through the percentage-of-recovery method or through the lodestar method. In the lodestar method, "the court multiplies the number of hours that lead counsel reasonably worked by the reasonable hourly rate for that work to determine the counsel's lodestar, which may be multiplied by a factor intended to compensate the attorneys for the risks they faced and any other special circumstances." *In re Cendant Corp. Sec. Litig.* ("Cendant II"), 404 F.3d 173, 188 (3rd Cir. 2005). The percentage-of-recovery method, on the other hand, "resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3rd Cir.), cert. denied, 534 U.S. 889 (2001). Applicable Third Circuit precedent "recommend[s]" that district courts compare the results at which they arrive via the percentage-of-recovery method with an abbreviated calculation of the lodestar amount." *Cendant I*, 264 F.3d at 285. "The goal of this practice is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel." *Cendant I*, 264 F.3d at 285. Thus, "when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." *Rite Aid*, 396 F.3d at 306.

F.3d 294, 305-06 (3rd Cir. 2005). In terms of the “hours worked” and reasonable hourly rate components of lodestar evaluation, it has been clear since this methodology was first announced in the Third Circuit’s *Lindy* cases that the number of hours reasonably worked for the benefit of the class may not be based on the self-serving assertions of the fee petitioners but, rather, must be determined independently by the district court based on an appropriate and reasonably specific evidentiary record, a process sometimes characterized as “cumbersome, enervating and often surrealistic.” See, e.g., *Lindy Bros., Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, (“*Lindy I*”), 487 F.2d 161, 167 (3rd Cir. 1973); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 48-49 (2nd Cir. 2000); 1985 TASK FORCE REPORT, 108 F.R.D. at 246 & 258; *Cendant I*, 264 F.3d at 256.

11. Indeed, even though the percentage-of-the-fund with an abbreviated lodestar cross-check method for common fund fee adjudication was adopted in part to relieve the district courts of this herculean task, most courts supervising large MDL/Class cases and using this methodology still require an independent audit of the reasonableness of the time and hourly rates claimed by petitioning counsel to assure that their fee adjudication is predicated on an accurate understanding of the hours actually and reasonably devoted to the case by those who seek participation in large fee awards. See, e.g., *Diet Drugs*, 553 F.Supp.2d at 458; *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 643 (E.D.La. 2010), *In re Oil Spill by the Deepwater Horizon*, MDL 2179, 2016 WL 6215974 at \*14 (E.D. La. Oct. 25, 2016).

12. As noted earlier, the lodestar methodology requires that the court-determined lodestar of the petitioning attorneys be increased or decreased by a “multiplier” to account for the “contingent nature of success” and the “quality of an attorney’s work.” *Lindy I*, 487 F.2d at 168. See also, e.g., *Cendant II*, 404 F.3d at 188. In this regard *Lindy* long ago cautioned that a:

court must recognize that a consideration of “quality” inheres in the “lodestar” award: counsel who possess or who are reputed to possess more experience, knowledge and legal talent generally command hourly rates superior to those who are less endowed. Thus, the quality of an attorney’s work in general is a component of the reasonably hourly rate; this aspect of “quality” is reflected in the “lodestar” and should not be utilized to augment or diminish the basic award under the rubric of “the quality of an attorney’s work”. \*\*\* Rather, the increase or decrease reflects exceptional services only; it may be considered in the nature of a bonus or penalty. The heavy burden of proving entitlement to such an adjustment is on the moving party.

*Lindy Bros. Builders Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, (“*Lindy II*”), 540 F.2d 102, 118 (3rd Cir. 1976).

13. A quality multiplier is justified only by reference to (a) “an evaluation of the professional methods utilized in processing the case, rewarding the use of efficient methods to expedite the case” and, more importantly, (b) the “benefit monetary or non-monetary conferred on the class”. *Id.*; *see also Lindy I*, 487 F.2d at 168 (“the amount of recovery obtained ... may be the only means by which the quality of an attorneys’ performance can be judged where a suit is not settled before any significant in-court proceedings”). Writing as the reporter for the American Law Institute’s PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, Seeger’s appellate counsel, Professor Samuel Issacharoff, expressly recognized that for purposes of any common benefit fee award, the benefit conferred on the class has to be calibrated based on the direct monetary amounts *actually delivered* to the class, not some hypothetical, abstract or hoped for benefit stream. Prof. Issacharoff stated “[a]ttorney’s fees in class actions, whether by litigated judgment or by settlement, should be based on ... the actual value of the judgment or settlement to the class.... \*\*\* For case judgments or settlements, *the actual value is the value actually paid to class members.*” American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION at 3.13(a) & Comment a (2010) (emphasis supplied).



14. Unlike securities and antitrust class actions, where an irrevocable fund is created for the benefit of the class to be divided *pro rata* by claiming class members based on their purchases, mass tort class actions and “quasi-class actions” are typically constructed on a pay-as-you go model that requires the defendant to fund claims only as they are determined payable and, in any event, generate complex questions that require substantial litigation beyond ministerial settlement administration.

15. Because the amount of the benefits actually paid (or to be paid with certainty) to class members or claimants in such mass tort cases is literally impossible to determine until substantially all claims have been adjudicated, courts universally defer making an award of fees until that critical endpoint. *See Diet Drugs*, 401 F.3d at 150-51 (“Because questions regarding the value of the settlement and the benefits conferred on Class Members remain unsettled, the District Court found that it could not undertake a *Gunter* analysis and make a full fee award”); *Deepwater Horizon*, 2016 WL 6215974 at \*6 - \*8 (fee adjudication only after payment of over \$10 billion in benefits); *Vioxx*, 760 F.Supp.2d at 646 (fee adjudication only after full processing and payment of all claims from settlement fund of approximately \$5 billion); *Diet Drugs*, 553 F.Supp.2d at 459, 460-463 (final fee adjudication only after substantial payment of settlement benefits totaling in excess of \$6 billion).

16. Indeed, given the public policy considerations implicated by a judicial award of attorney’s fees, one is hard pressed to argue that the attorneys for class members should be paid substantially before the class members themselves have received actual payment of the settlement benefits that justify such an award in the first instance. *See, e.g., In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 730 (3rd Cir.), *cert. denied*, 534 U.S. 889 (2001) (thorough judicial



review of fee applications in all class action settlements is required to protect against “potential public misunderstandings.”).

17. Even cursory examination of these fundamental principles reveals that Seeger’s methodology for allocating any aggregate fee award herein is hopelessly flawed.

18. To begin with, in this case there has been no independent review of the lodestar amounts claimed by each of the fee petitioners to determine whether the amount of time claimed by each firm was for services that were actually performed, reasonable, necessary and non-duplicative and whether the hourly rates claimed for those who performed such services are reasonable in light of the training, skill and experience of those attorneys and paraprofessionals. Without such an independent review it is impossible to see how those lodestar values can fairly or lawfully be utilized to make individual awards to each of the fee petitioners herein.

19. In terms of assigning a differential multiplier to the self-reported lodestar amounts claimed by the fee applicants herein, as we have seen, there are three legal factors that govern such an assignment: (1) the risk of non-compensation, (2) the use of efficient methods to expedite the case, and (3) the actual value of monetary benefits paid to class members. None of these factors warrants the vastly differing multipliers Seeger assigned to the lodestar amounts he determined he would allow for each of the fee applicants here.

20. The first factor was not considered by Seeger at all. *See* Declaration of Brian T. Fitzpatrick. This, despite the fact that the risks of the various fee applicants ranged from minimal (Prof. Issacharoff, who invested no money in the litigation and represented no player) to extremely substantial, (LLF, who by virtue of being on the PEC and having filed the most cases has by far the greatest risk).

21. With regard to the second factor, it is difficult to see how the services performed by Seeger and those whom he would reward with higher than average multipliers can justify such a grotesque award based on purported litigation efficiencies that they allegedly generated.

22. Indeed, it actually appears that Seeger was responsible for inefficiencies that delayed compensation to Class Members. For example, his error in agreeing to cap the NFL's financial exposure without hard data regarding the likely attack rate of each disease required the Court to take the unusual step of denying preliminary approval to the Settlement sending the parties back to the bargaining table with a resulting six-month delay in Class Members recovering compensation. *In re Nat'l Football League Concussion Injury Litig.*, 961 F.Supp.2d 768 (E.D.Pa. 2014).

23. Another mistake by Seeger – allowing claims processing to be deferred until after final judicial approval of the Settlement – meant that claims were not adjudicated and ready for payment as soon as this Court's approval of the Settlement was affirmed on appeal.

24. A third error topped them all. Seeger agreed to the release all amateur leagues and teams from liability for zero compensation, a decision the Court corrected and that begs the question whether Seeger fully understood the Agreement.

25. If anything, consideration of efficient or inefficient methods of litigation might warrant a negative multiple for Seeger, rather than the uniquely high multiple he claims for himself at the expense of his partners in this litigation.

26. Finally, with respect to the benefit-conferred-on-the-class prong of the multiplier analysis, it is simply too early to evaluate that factor. Claims in the present litigation have just started to be paid. The vast bulk of claims have not been determined. Even if, under certain

circumstances, it were legally appropriate to project future claim payouts based on the limited number of claims adjudicated to date, there is no reliable basis to do so here.

27. Virtually all of the paid claims to date are those involving diseases diagnosed based on hard objective data, like Amyotrophic Lateral Sclerosis or death with CTE. However, the vast majority of claims in this case are based on subjectively measured neurocognitive deficits. In the real world, such deficits are diagnosed based on subjective criteria and the skill and judgment of the treating physician or neuropsychologist and the treating specialist.

28. The Settlement Agreement, however, attempts to objectify the qualifying diagnostic criteria for neurocognitive disease and provide multiple safeguards against payment of phony neurocognitive deficit claims. It remains to be seen how the objectification criteria and fraud prevention measures will actually work in reality and, therefore, how many class members who were alive at the time of the Settlement will actually receive benefits for diagnosed neurocognitive deficits.

29. The Seeger Declaration itself recognizes that there is much work to be done on behalf of claiming class members before these claims are finally adjudicated. Hence, at this point it is impossible to determine how much the Settlement actually benefitted Class Members and, for this reason, construction of a “benefit multiplier” for each fee applicant is impossible.

30. Indeed, given the emphasis of contemporary fee jurisprudence on the actual benefits conferred on class members, it is hard to see why the Court should even award an aggregate fee at this point. *See e.g., Prudential*, 148 F.3d at 337 n.116, *quoting Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 910 (3rd Cir. 1985) (“[T]he relevant inquiry to determine eligibility for [common benefit] fees (whether plaintiffs prevailed and whether the [class] litigation was causally linked to the relief obtained) ‘focuses a court’s attention on the

benefits actually received and caused by [class counsel], [and] will determine not only the often evident threshold question of eligibility for fees, but it will also be critical in determining the amount of a reasonable fee award, in that the final award must depend on a full assessment of the extent of the benefits received by plaintiffs.”); *In re Rite Aid Securities Litig.*, 396 F.3d 294, 300 (3rd Cir. 2005) (common fund award should “reward[] counsel for success and penalize[] it for failure.”).<sup>4</sup>

31. Rather, the Court should follow the standard practice of waiting until substantially all class members with pending claims have been processed as in the *Diet Drugs*, *Vioxx* and *Deepwater Horizon* cases referenced above. Given the relatively small number of claiming Class Members here, if the Settlement is as good as Seeger contends, that point should be reached in the relatively near future. There is no need jump the gun and place the Court in the unsavory position of paying the lawyers before their injured clients receive a penny.

**SEEGER’S METHOD AND ALLOCATION NEGATIVELY IMPACTED LOCKS LAW  
FIRM AND SUBSTANTIALLY REDUCED ITS LODESTAR  
FOR ALLOCATION PURPOSES**

32. Seeger’s faulty methodology gives comparatively little to LLF, although our firm is one of four class counsel and represents many more retired players than any other firm and

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<sup>4</sup> Computation of the actual benefit conferred on class members is necessary to determine the value of the settlement fund for purposes of making an award of fees as a percentage of that fund and is essential in order to determine one of the key “*Gunter* factors” that a district court in the Third Circuit must consider in order to make an appropriate award. *E.g.*, *Cendant I*, 264 F.3d at 256 (the court “calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by *the total amount paid out by the defendant*; it then inquires whether that percentage is appropriate based on the circumstances of the case”) (emphasis supplied); *Rite Aid*, 396 F.3d at 301 (“A district court should consider seven factors when analyzing a fee award in a common fund case [including] the size of the fund created and the number of persons benefitted”)

exponentially more than Seeger. Seeger's omissions and mistakes regarding LLF are enormous, and they are set forth below.

33. First, Seeger's stated method of how he assessed any firm's contribution is set forth on page six of his Declaration in bullet points:

- Roles in leadership, including Court-appointed Leadership Positions, such as Co-Lead Counsel, Co-Lead Class Counsel, Class Counsel, Subclass Counsel, membership on PEC and PSC, and Liaison Positions;
- The point at which a firm's claimed common benefit contributions were made (i.e., were they involved in the earliest stages of a project, or were they brought in mid-way to help on particularized issues); and
- Contributions to the Settlement, including, most importantly, early settlement discussions, formal settlement negotiations and mediations, approvals of the Settlement Agreement, and defense of the Settlement through the attempted appeal to the Supreme Court.

34. Notwithstanding LLF's substantial contributions at every phase of the process, Seeger mischaracterizes our contribution as relatively menial (*see* Seeger Declaration at 10), although LLF did, among other things, the following:

- a. From the inception of this litigation, LLF filed more cases and represented more clients than any other firm. This includes the pre-MDL phase of this case forward, when, from the beginning LLF, led the litigation by both its actions and by the numbers of retired players it represents.
- b. In January 2012, the undersigned argued before the JPML for the MDL to be assigned to this Court and demanded a settlement as the only feasible option for the NFL.
- c. Two partners of LLF (the undersigned and David Langfitt) became Court-appointed members of the PEC and PSC in April 2012;

- d. LLF drafted the Master Complaint based largely from its own original complaints, but also on the complaints of Podhurst Orseck, Goldberg Persky, Hausfeld, and Anapol Weiss.
- e. Prior to January/February, 2013 negotiations, LLF filed hundreds of individual cases and class cases in federal and state court nationwide to put pressure on the NFL (1 National Class, 3 state wide classes, 25 individual actions and 27 multiple plaintiff's complaints – 8 to 127 plaintiffs). (See Lists attached as Exhibit A;
- f. LLF was the only firm to obtain preservation depositions (six) by District Court orders in New York (SDNY) that showed to NFL counsel and preserved for the record the extraordinary brain damage icons of professional football had sustained, brain damage the NFL in earlier months and years had willfully and vociferously denied.
- g. To the NFL's consternation and anger, the undersigned was featured and interviewed for a *Businessweek* publication in Nov – Dec, 2012 which was published a few months after settlement negotiations began. That interview infuriated the NFL and spurred it to negotiate earnestly since it was plain to the NFL that the risk of not settling the matter was very high. This was, from the beginning, a very dangerous public-relations case for the NFL. It still is. When LLF and others exposed the NFL for denying the existence of insidious brain injury in football, the NFL risked losing its fan-base and revenue. It still does, and it has never faced an existential crisis of this magnitude. When

*Businessweek* made clear to the public that the seriousness of this matter could well run into an uncapped liability to the NFL of multiple billions of dollars, the leverage of that publicity at the same time the Court ordered the parties to negotiate and work out a deal was substantial. The result was an uncapped settlement created in large measure by this Court, not Seeger, which proved that the statements in *Businessweek* were true. The result of the claims process, still not yet certain, may also prove these statements to be true.

- h. The anger expressed by the NFL in the aftermath of the interview was tempered by the fact that the NFL ultimately sought a settlement similar to what LLF had pleaded in his lawsuits from the start; i.e., a settlement that included diagnostic monitoring and monetary awards.
- i. LLF created the retired player/injured player database (the majority of which was based on LLF clients) that became the foundation of the settlement negotiations.
- j. LLF was involved in every phase of the negotiations with the NFL, even though not always in person, and when the Settlement was achieved, LLF kept its very large number of class members apprised of the value of the Settlement to them personally and to the class as a whole.
- k. Without LLF's work, the Settlement may not have happened when it did and would not have been as successful.
- l. Once achieved, LLF made certain that its clients understood the Settlement and did not seek routes that would attempt to upend the Settlement. This

involved constant communications with attorneys and leaders of the plaintiff class.

35. For reasons unknown, Seeger's recitation at page 10 of his Declaration neither recalls nor acknowledges LLF's participation and contribution.

36. The result is that Seeger adversely discounted the firm's loadstar by unilaterally deleting more than \$1.5 million of the firm's time and hours without explanation. Never did Seeger invite a deliberative process where LLF as class counsel might agree on the elements of a proper allocation. Seeger unilaterally carved up the time records of LLF and other firms, yet never entered a deliberative process whereby his own records may be subject to scrutiny by class counsel.

37. In particular, Seeger unilaterally disregarded and disallowed all of the LLF pre-MDL and pre-negotiation work, all of which were vital to the success of the case. This is significant time and amounts to many hours in fees disallowed, substantially reducing LLF's loadstar. During the pre-MDL period, LLF aggressively filed more claims and represented more clients than any other firm. LLF filed a vast number of individual claims and class cases in state and federal courts for the purposes of putting maximum pressure on the NFL. *See* attached docket compilation at Exhibit B.<sup>5</sup> The fact that the undersigned was co-lead counsel for *In re Diet Drug Litigation* also meant that the demands for settlement at the inception of this case did not ring hollow to the NFL.

38. Seeger's unilateral decision not to include pre-MDL time is contrary to the position he took before Judge Fallon in the *Vioxx* matter. Firms that take the risk to originate

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<sup>5</sup> The attachment is a profile of the pre-MDL work LLF did and the leverage LLF exerted on the NFL at that time.



significant successful litigation like that which arose in this matter should be compensated for their actions out of a Common Benefit Fund. *See In re Vioxx Products Liability Litigation*, 802 F.Supp. 2d 740, 780 (E.D.La. 2011) (noting in awarding common benefit fund fees that a firm had “been at the forefront of the Vioxx litigation since its inception in 2001”, four years before the beginning of that MDL, having filed the second Vioxx case that year). *See also In re Cendant Corp. Securities Litigation*, 404 F.3d 173, 195 (3d Cir. 2005) (stating in relation to a securities class action that “[w]e therefore conclude that the court's involvement in the fee decision will be at its height when the fee request is for work performed before the appointment of the lead plaintiff, if an attorney creates a substantial benefit for the class in this period.”)

39. Seeger also deleted all of the LLF firm’s paralegal time, yet allowed paralegal time for his own firm and his co-counsel, Levin’s firm. LLF demanded an explanation, but received only the nostrum that no paralegal time would be included. Obviously, this could not be true, because Seeger and Levin included paralegal time for their firms. When subjected to the extreme multiplier Seeger granted for both firms, Seeger and Levin stand to be paid over \$900 to \$1,000 per hour for paralegal work they normally charge at \$215 per hour. Yet LLF is to receive nothing at all.

40. Seeger has decided that the multiplier for LLF is *de minimis* and not commensurate with the actions taken by the firm. Seeger assigned LLF a 1.25 multiplier, but recommended a multiplier more than twice that for other PEC member firms.

41. Seeger partially based his multiplier decisions on recommendations of Brian T. Fitzpatrick, Professor of Law at Vanderbilt University. In his Declaration, Professor Fitzpatrick explains the methodology by which Seeger allegedly “adjusted each firm’s lodestar”, i.e.,

43. A fundamental factor in the calculation of any allocation is the significance of the risk of non-compensation a law firm took on and managed by representing injured parties in high-stakes litigation. See ¶ 19 of this Declaration. This involves full-time work, substantial debt, and litigation in multiple courts nationwide to create clarity and understanding for the



47. I negotiated their creation, participated in their implementation, and still am an advisor to many Trusts or Funds established to pay claimants in mass tort personal injury settlement claims processing entities<sup>6</sup>.

48. In each of the funds, I became a trustee advisor to the entity performing the distribution of the funds to claimants. My work included monitoring and overview of the implementation and procedures of their various distribution functions.

49. As a trustee advisor to the various trusts that were created, I, and other plaintiffs' counsel, have served without payment and in some of the trusts received per diem amounts and travel expenses. As the creator of the Trust and attorney for many of the individual beneficiaries, it was my duty and responsibility to continue to advise without hourly payment or lodestar.

50. I also participated as co-negotiator of the Diet Drug litigation funds before Honorable Harvey Bartle, EDPA and consulted the trust that the Court created to implement and

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<sup>6</sup> By way of example, I was primary negotiator of the Agent Orange Class Settlement before the Honorable Jack Weinstein, USDC-NY. It was formed in 1983, a fund of initially 225 million dollars was created. I was co-lead negotiator of the Manville Personal Injury Trust which was formed in 1988. As of January 1, 2017, it has paid 5 billion dollars in benefits to 900,000 plaintiffs. I was sole negotiator of the UNR Claims Trust which was formed in 1989 and has paid slightly less than 400 million dollars in benefits to 450,000 plaintiffs. I was primary negotiator of the Eagle Pitcher Industries personal injury trust which was formed in 1996 and has paid more than 700 million dollars in benefits to 650,000 plaintiffs as of January, 2017. I was primary negotiator of the Celotex Personal Injury Trust which was formed in 1997 and has paid approximately 1.2 billion dollars in benefits to 475,000 plaintiffs as of January 2016. I was co-lead negotiator of Raytech personal injury trust which was formed in 2006 with approximately 55 million dollars and has processed claims for 135,000 plaintiffs. I was sole negotiator of Amatex personal injury trust which was formed with approximately 75 million dollars and paid several thousand plaintiffs. I was sole negotiator of Pacor personal injury trust which was formed in 1997 with approximately 30 million dollars and has processed in excess of 10,000 plaintiffs' claims.



58. In the February 17 Declaration, Seeger makes the bold statement at paragraph 104 that \$112.5 million in attorneys' fees should only be paid for past common benefit work and expenses prior to the effective date. There is no justification why the time line of the effective date of the settlement should be the dividing line for common benefit work. This is especially relevant since the calculation of the \$112.5 million dollars was negotiated when there was an unsuccessful capped fund and before the Court ordered that the settlement include an uncapped fund. Therefore, there is no reason why additional money, if needed, for appropriate implementation and processing, should not be paid by the NFL.

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done before the effective date, and it was done by Garretson and BrownGreer, not Seeger. The BAP and MAF Funds have money to pay for these services.

60. The work on the registration process referred to paragraph 109 were part of the duties and responsibilities of BrownGreer. Monies were set aside in a fund for that. The bulk of the BAP services were not the responsibility of class counsel but part of Garretson's BAP program duties, and a special BAP fund is available to pay for those services if the NFL does not pay. The launching of the BAP process to which Seeger refers in Paragraph 110, again, was predominately Garretson's responsibility, to which Seeger and the BAP fund is available to pay for those services.

61. The duties to which Seeger refers in paragraph 111, – to Coordinate with Claims Administrator, BAP Administrator and lien resolution Administrator and Settlement Trustee going forward – should be part and parcel of a single meeting on a quarterly basis to handle all of these matters.

62. Moreover, the preferred way to execute the process would be a committee of class counsel who actually represent claimants, as opposed to counsel hired by Seeger Weiss, who has filed no claims and has no first-hand experience with retired players, even though the Seeger lawyers are well intentioned, diligent and hard working.

63. Seeger's Declaration alleges multiple meetings with NFL and BrownGreer for which Seeger's attorneys seek payment. These were unnecessary, redundant and counter-productive, since BrownGreer are professional claims administrators with exponentially more experienced in the claims process than Seeger or NFL.

64. The alleged work to which Seeger refers in Paragraph 112 (to appeal Awards of Settlement for decision and/or provide assistance to claimants) is a responsibility, if any, or at

minimum on a case by case basis in the future and should not be part of any special funding request. Also the number of appeals is minimal, probably less than 1% of claims filed and, mostly, the appeals come from the NFL.

65. The duties to which Seeger refers in Paragraph 113 concern maintaining the Appeals Advisory Panel (AAP). This has been done and is the primary responsibility of BrownGreer, not others. It is payable from the MAF Fund.

66. With respect to Paragraph 114, which refers to plaintiffs' counsel keeping up with the science, this is certainly not compensable work, and there is no evidence to date that Seeger or his lawyers understand the medical science sufficiently to understand the symptoms suffered by former players, or that they have the inclination to bring disputes with the NFL on claims processing to the Court's attention for rapid resolution.

67. With respect to Paragraphs 115 and 116, which refer to monitoring and reviewing the BAP and MAF programs, this should be done at regular meetings of class counsel and the NFL to insure that the NFL adheres to its responsibilities. Both items must include class counsel, and they should not involve an exorbitant amount of time if BrownGreer is allowed to do it's work. This appears to be an example of micro-management by Seeger and NFL, and there is no evidence to date that these efforts have helped claimants at all. In light of recent allegations that NFL and Seeger have unilaterally amended the agreement to the detriment of retired players, the efforts may have hurt claimants, not helped them.

68. Thus, none of the alleged services in Seeger's February, 2017 Declaration justify a 5% set aside.

69. As to the October 10, 2017 Declaration, nothing proffered justifies a 5% set aside going forward.



70. In paragraph 20(a), Seeger seeks compensation for registering players, updating the website, and helping prepare claim forms. Such services should be paid by the MAF fund, since these duties were the responsibility of BrownGreer.

71. In paragraph 20(b), Seeger seeks compensation for the selection of the AAP panel members and consultants. This work was largely the duty and responsibility of BrownGreer, not Seeger, whose attorneys, albeit with good intentions, frequently duplicated BrownGreer's work.

72. In paragraph 20(c), Seeger seeks compensation for obtaining the BAP providers and qualified physicians. This work was done primarily by Garretson, sometimes guided and advised by LLF. Garretson did its job successfully, albeit not always timely. The role of monitoring both the BAP and MAF network can be and should be done at regular meetings with BrownGreer and Garretson and Class Counsel who actually represent retired players should be involved, but currently they are not.

73. In paragraph 20(d), Seeger wants to be paid for monitoring and oversight of every AAP decision. This is duplicative and counter-productive. It should be done at regular meetings, if necessary, with BrownGreer, who is uniquely qualified to do it. Again, if this is so important, then class counsel should be involved, yet Seeger has repeatedly refused class counsel's demands to be involved in implementation.

74. In paragraph 20(e), Seeger seeks payment for monitoring appeals and claim determinations. BrownGreer can do this better, and if plaintiff's counsel should be involved, Class Counsel should be directly involved, not just Seeger.

75. In paragraph 20 (f), Seeger wants to be paid for monitoring BAP examinations, which is a Garretson function. This is duplicative, counter-productive and not necessary. If it is

required, class counsel should be involved, because Class Counsel has far greater knowledge of the nuances of neurological examinations and the difficulties faced by injured players.

76. In paragraph 20 (g), Seeger seeks payment for fielding calls from class members. It is not reimbursable. It is part of the duties and responsibilities of co-lead counsel.

77. Finally, Seeger wants payment for organizing and challenging misleading solicitations. This may be the only reimbursable expense that is ongoing and may continue, since these issues concern the integrity of the settlement. The NFL should pay for these efforts, and it should come from the existing \$112.5 million dollar fund.

78. The analysis above shows that a substantial amount of time and payment requested by Seeger reflects two things: an attempt by the NFL and Seeger to micro-manage the claims administration and an attempt by Seeger to allocate to itself alone the task of management without the involvement or consent of class counsel.

79. In the first nine months of the claims process, Seeger attorneys have been involved in 70 plus committee meetings, phone calls, and discussions regarding claims administrative processes, decisions and disputes. It is difficult to discern whether any of this process is successful, but it appears to have hindered, not helped, BrownGreer to administer the Settlement. Class Counsel has never been involved in this process. It should not be rewarded.

80. It should be the Claims Administrator's job to administer the claims and interpret the agreement. It is neither efficient nor sensible to have Seeger and NFL hamper the Administrator's job or disallow the involvement of Class Counsel. It certainly should not be reimbursable via the proposed set aside from paid claims.

81. If, as has been represented by Seeger, the ultimate fund paid to the players will be one billion dollars, adding the proposed 5% set aside to the 112.5 million dollars already

available would make the compensable fees in excess of 16% of the projected fund, a fraction of which has been paid to claimants. This projected award is substantially above any other mega fund award (*see* Opinion of Hon. Harvey Bartle in *In re Diet Drug*, 553 F.Supp.2d at 479-480 EDPA April 9, 2008). This is the only mega fund case in which there was no paper discovery, no depositions, no motion practice, no litigation, no trials, no trial activity as in all previous mega funds in which settlement occurred after litigation work was accomplished.

82. It is obvious that Seeger's request is excessive, exorbitant and without precedent. It should be denied and no 5% set aside award granted. No other fair conclusion can be made.

83. If there is a need for some future set aside, which is unlikely, the maximum amount should be 0.5% not 5%. On the incorrect assumption that the value of the claim fund will be approximately one billion dollars, as has been suggested by various prognosticators, it is outrageous to assess 5%, which is 50 million dollars for the future potential services, especially since so few plaintiffs have been paid.

Respectfully submitted,

LOCKS LAW FIRM

BY:

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601 Walnut Street, Suite 720 East  
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# EXHIBIT A

JA8081

# Locks Law Firm

## Individual Case Filings – (Chron.)

1. 5/7/2012 Charles Hannah v. NFL, USDC, EDPA, No. 12-cv-2489  
LPA2012185 Individual
2. 4/2/2012 Greg Landry, et a. v. NFL, USDC, EDPA, No. 12-cv-1643  
LPA2012463 Individual
3. 4/7/2012 Thomas McDonald, et al. v. NFL, PCCP, No. 1204-1887  
LPA2012500 Individual
4. 6/19/2012 Scott M. Ross v. NFL, USDC, EDPA, No. 12-cv-3479  
LPA2012356 Individual
5. 6/19/2012 Jason Short, et al. v. NFL, USDC, EDPA, No. 12-cv-3478  
LPA2012452 Individual
6. 7/12/2012 Michael Pyle, et al. v. NFL, NY Supreme Ct, NY County, No. 154506/2012  
LPA20121005 Individual
7. 7/10/2012 Fred Willis, et al. v. NFL, USDC, District of Massachusetts, No. 12-cv-11248  
LPA2012398 Individual
8. 7/20/2012 Scott Ross v. NFL, NY Supreme Ct, NY County, No. 154751/2012  
LPA2012356 Individual
9. 9/4/2012 Glenn Amerson, et al. v. NFL, PCCP, No. 1209-0326  
LPA20121148 Individual
10. 9/14/2012 \*Curtis McClinton v. NFL, USDC, WDMO, No. 4:12-cv-01275-JTM  
LPA2012396 Individual
11. 10/5/2012 Patrick Fischer, et al. v. NFL, USDC, Dist. Maryland, No. 8:12-cv-2963-JFM  
LPA20121401 Individual
12. 10/5/2012 Elmer Wingate, Jr. v. NFL, Cir. Ct. Baltimore MD, No. No. 03-C-12-010322-OT  
LPA20121404 Individual
13. 10/16/2012 William Mathis v. NFL, NY Supreme Ct, NY County, No. 157269/2012  
LPA20121303 Individual
14. 10/30/2012 \*Kenney/Baugh v. NFL, 16<sup>th</sup> Cir. Court, Jackson, MO, No. 1216-cv-28199  
LPA20121127/LPA20121140 Individual
15. 11/14/2012 Daniel Brabham, Dec'd, v. NFL, NY Supreme Ct, NY County, No. 158011/2012  
LPA2012989 Individual
16. 11/14/2012 Raymond Abruzzese, Dec'd v. NFL, NY Supreme Ct, NY Cty, No. 158012/2012  
LPA2012478 Individual

Updated: 7/18/2013

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|----------------|--------------------------------------------------------------------------------------------------------|------------|
| 17. 12/20/2012 | Archie Matsos v. NFL, NY Supreme Ct, NY County, No. 159062/2012<br>LPA20121352                         | Individual |
| 18. 12/20/2012 | Fletcher (Joe) Perry, Dec'd v. NFL, NY Supreme Ct, NY County, No. 159094/2012<br>LPA20121473           | Individual |
| 19. 12/20/2012 | Larry Bowie v. NFL, NY Supreme Ct, NY County, No. 159069/2012<br>LPA20121266                           | Individual |
| 20. 12/21/2012 | Ross Hawkins v. NFL, NY Supreme Ct, NY County, No. 159057/2012<br>LPA20121475                          | Individual |
| 21. 12/26/2012 | Scott "Cookie" Gilchrist v. NFL, NY Supreme Ct, NY County, No. 159129/2012<br>LPA20121218              | Individual |
| 22. 01/02/2013 | Otis Taylor, et al. v. NFL, 16 <sup>th</sup> Cir. Court, Jackson, MO, No. 1216-cv-34713<br>LPA20121544 | Individual |
| 23. 01/04/2013 | Tom Bettis, et al. v. NFL, NY Supreme Ct, NY County, No. 150091/2013<br>LPA20121474                    | Individual |
| 24. 01/17/2013 | Steven Schmitz, et al. v. NFL, NY Supreme Ct, NY County, No. 150481/2013<br>LPA2013510                 | Individual |
| 25. 01/22/2013 | Bill Quinlan, et al. v. NFL, NY Supreme Ct, NY County, No. 150620/2013<br>LPA2013509                   | Individual |
| 26. 03/25/2013 | Robert Watkins, et al. v. NFL, Superior Ct, Bristol, MA, No. BRCV2013-00258-C<br>LPA20121477           | Individual |
| 27. 04/15/2013 | William (Don) Gillis v. NFL, NY Supreme Ct, NY County, No. 153414/2013<br>LPA20121424                  | Individual |
| 28. 05/01/2013 | Don Paul v. NFL, NY Supreme Ct, NY County, No. 153978/2013<br>LPA20121435                              | Individual |
| 29. 06/06/2013 | Estate of Lewis Carpenter v. NFL, USDC, EDPA, No. 13-cv-03894<br>LPA2013559                            | Individual |

**CLASS AND MULTIPLE PLAINTIFF FILINGS**

1. 1/18/2012 Ron Solt, et al. v. NFL, No. USDC, EDPA, No. 12-cv-00262  
Class – 7 Plaintiffs LPA201224
2. 1/20/2012 Rob Johnson, et al. v. NFL, USDC, EDPA, No. No. 12-cv-00324  
13 Plaintiffs LPA201210
3. 2/3/2012 Ashley Lelie, et al. v. NFL, USDC, EDPA, No. No. 12-cv-00600  
8 Plaintiffs LPA201232
4. 2/3/2012 Britt Hager, et al. v. NFL, No. USDC, EDPA, No. 12-cv-00601  
42 Plaintiffs (41) LPA201241
5. 2/10/2012 Steve Everitt, et al. v. NFL, USDC, EDPA, No. No. 12-cv-00731  
58 Plaintiffs LPA2012100
6. 2/17/2012 John Brodie, et al. v. NFL, USDC, EDPA, No. No. 12-cv-00861  
45 Plaintiffs (43) LPA2012200
7. 2/24/2012 Carl Hairston, et al. v. NFL, USDC, EDPA, No. No. 12-cv-00989  
52 Plaintiffs (50) LPA2012249
8. 3/5/2012 Jethro Pugh, et al. v. NFL, USDC, EDPA, No. No. 12-cv-01165  
63 Plaintiffs LPA2012303
9. 3/9/2012 Wes Hopkins, et al. v. NFL, USDC, EDPA, No. No. 12-cv-01239  
25 Plaintiffs LPA2012372
10. 3/12/2012 Eric Allen, et a. v. NFL, USDC, EDPA, No. No. 12-cv-1281  
45 Plaintiffs (43) LPA2012400
11. 3/21/2012 Michael Haddix, et al. v. NFL, NJ Superior, No. CAM-L-1363-12  
NJ Class – 3 Plaintiffs LPA2012498
12. 3/23/2012 Mark Rypien, et al. v. NFL, USDC, EDPA, No. 12-cv-1496  
127 Plaintiffs (124) LPA2012600
13. 4/2/2012 Frank Lemaster, et al. v. NFL, PCCP, 1204-0108  
PA Class – 3 Plaintiffs LPA2012497
14. 4/2/2012 John “Golden” Richards, et al. v. NFL, USDC, EDPA, No. 12-cv-1623  
71 Plaintiffs LPA2012731
15. 4/12/2012 Alex Karras, et al. v. NFL, USDC, EDPA, No. 12-cv-1916  
70 Plaintiffs (69) LPA2012809
16. 4/19/2012 Mark Chmura, et al. v. NFL, USDC, EDPA, No. 12-cv-2108  
28 Plaintiffs LPA20121098
17. 4/23/2012 Jeff Hostetler, et al. v. NFL, USDC, EDPA, No. 12-cv-2199  
78 Plaintiffs (75) LPA2012893

- Case 1:12-md-00332-LP Document 1-1 Filed 05/17/13 Page 9 of 17  
Case 1:12-md-00332-LP Document 1-1 Filed 05/17/13 Page 9 of 17
18. 5/7/2012 Brad Cupepper, et al. v. NFL, USDC, EDPA, No. 12-cv-2490  
26 Plaintiffs (25) LPA2012972
  19. 5/16/2012 Bryon Evans, et al. v. NFL, USDC, EDPA, No. 12-cv-2682  
41 Plaintiffs LPA2012978
  20. 6/13/2012 Jeff Nixon, et al. v. NFL, USDC, EDPA, No. 12-cv-3352  
49 Plaintiffs LPA20121072
  21. 6/14/2012 John Hannah, et al. v. NFL, USDC, EDPA, No. 12-cv-3379  
23 Plaintiffs LPA20121082
  22. 7/02/2012 Dave Robinson, et al. v. NFL, USDC, EDPA, No. 12-cv-3731  
43 Plaintiffs LPA20121139
  23. 7/20/2012 Richard J. Watters, et al. v. NFL, USDC, EDPA, No. 12-cv-4159  
46 Plaintiffs LPA20121206
  24. 7/20/2012 Chuck Foreman, et al. v. NFL, USDC, EDPA, No. 12-cv-4160  
95 Plaintiffs LPA20121257
  25. 7/23/2012 Stephen Wisniewski, et al. v. NFL, USDC, EDPA, No. 12-cv-4187  
20 Plaintiffs LPA20121265
  26. 9/4/2012 George Andrie, et al. v. NFL, USDC, EDPA, No. 12-cv-5059  
59 Plaintiffs LPA20121351
  27. 10/2/2012 Wesley Chandler, et al. v. NFL, USDC, EDPA, No. 12-cv-5624  
37 Plaintiffs LPA20121402
  28. 10/5/2012 Jody Schulz, et al. v. NFL, Cir. Ct. Queen Anne's MD, No. 17-C-12-017392  
MD Class – 3 Plaintiffs LPA2012
  29. 10/29/2012 Louis Breeden, et al. v. NFL, USDC, EDPA, No. 12-cv-06080  
21 Plaintiffs LPA20121405
  30. 11/9/2012 Hugh (Pat) Richter, et al. v. NFL, USDC, EDPA, No. 12-cv-06369  
55 Plaintiffs LPA20121472
  31. 01/2/2013 Jim Kanicki, et al. v. NFL, USDC, EDPA, No. 13-cv-00019  
32 Plaintiffs LPA20121543
  32. 03/1/2013 Dave Butz, et al. v. NFL, USDC, EDPA, No. 13-cv-01109  
24 Plaintiffs LPA2013523
  33. 03/19/2013 John M. Babinecz, et al. v. NFL, USDC, EDPA, No. 13-cv-01444  
19 Plaintiffs LPA2013528
  34. 06/06/2013 Barney Chavous, et al v. NFL, USDC, EDPA, No. 13-cv-03126  
15 Plaintiffs LPA2013562
  35. 06/06/2013 Johnnie Walton, et al v. NFL, USDC, EDPA, No. 13-cv-03125  
15 Plaintiffs LPA2013563



**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY  
LITIGATION

) MDL No. 2323  
)  
) No. 2:12-md-2323-AB

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and others  
similarly situated,*

) **Hon. Anita B. Brody**

Plaintiffs,  
v.

Civ. Action No. 14-00029-AB

National Football League, et al.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**COUNTER- DECLARATION OF THOMAS V. GIRARDI IN RESPONSE TO THE  
DECLARATION OF CHRISTOPHER A. SEEGER IN SUPPORT OF PROPOSED  
ALLOCATION OF COMMON BENEFIT ATTORNEYS' FEES, PAYMENT OF  
COMMON BENEFIT EXPENSES, AND PAYMENT OF CASE CONTRIBUTION  
AWARDS TO CLASS REPRESENTATIVES**

**COUNTER- DECLARATION OF THOMAS V. GIRARDI IN RESPONSE TO THE  
DECLARATION OF CHRISTOPHER A. SEEGER IN SUPPORT OF PROPOSED  
ALLOCATION OF COMMON BENEFIT ATTORNEYS' FEES, PAYMENT OF  
COMMON BENEFIT EXPENSES, AND PAYMENT OF CASE CONTRIBUTION  
AWARDS TO CLASS REPRESENTATIVES**

**DECLARATION OF THOMAS V. GIRARDI**

1. I am an attorney at law duly authorized to practice before all the courts of this state, and am a member of the law firm of Girardi|Keese, attorneys of record for Plaintiffs here. I have personal knowledge of the facts as set forth herein and could testify competently thereto if called upon as a witness. I make this declaration in response to the Court's request to respond to the Declaration of Christopher Seeger.
2. As an introduction to my declaration I would like to highlight several facts, which will be expanded on below. Girardi Keese along with two co-counsel firms, represented approximately 550 plaintiffs in this litigation. We were retained in 2010, 2011, and 2012.
3. The cases were vigorously prosecuted and defended. We retained experts to establish causation between helmet impact and brain damage. We had brain scans performed to enable our neurological experts to have the proper basis for their opinion of medical causation. We also retained economic experts to analyze the future losses of the players.
4. Years earlier, our law firm successfully tried a football concussion case. In that litigation, we were able to obtain documents which demonstrated that the NFL knew of these issues for decades. Thousands of hours were dedicated to this case. Hundreds of thousands of dollars have been expended to work up these cases. We believe, and have been informed by others, that our efforts were very important in motivating the parties to settle this case.
5. Furthermore, while we have supported the settlement in this case, it has and continues to raise concerns for the players. The following issues continue to cause concern: (1) The medical criteria required in order to receive a qualifying diagnosis, for example PET scans which are universally accepted in the medical community as a measure of showing brain damage, are not

accepted as part of the criteria for the administrative body; (2) In order to receive a qualifying diagnosis players after January of 2017 players must go to doctors selected by the NFL. These concerns, among others are elaborated upon below.

6. In addition to the information contained above, I would like to more specifically present several issues for the Court's consideration.

7. In determining the appropriate allocation of Common Benefit Funds three factors were considered by Christopher Seeger (1) extent to which the firm took on leadership roles in the litigation (2) how early the firm was meaningfully involved in the litigation and (3) whether the firm was involved in settlement negotiations or helped defend the settlement once it was consummated. Brian Fitzpatrick Declaration ¶ 6. Based upon our firms' early involvement, which is described more fully below, that the multiplier we have received, one, should be increased. Professor Fitzpatrick acknowledges that it is appropriate to adjust "upward the lodestars of the firms that made contributions from the outset of the litigation to its end." He says: "These adjustments are reasonable and supported by other cases. *See, e.g., Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 69009680, at \*3 (N.D. Cal. Oct. 24, 2016) (recommending multipliers based on whether firms 'joined the case prior to early settlements or class certification' or whether they 'joined later')." In this case we were the first to file, and the first to brief key motions, as is fully set forth below. Based upon this, we request that we receive a higher multiplier that more accurately reflects our early contributions to this litigation.

8. Our firm represents (along with co-counsel Goldberg Persky and White and Russomanno & Borello) 441 NFL Players. Our law firm also represents an additional 116 players in the NFL litigation. In total our firm represents more than 500 players in this litigation. All of these players signed individual retainers with our firm or our co-counsel's firm.

9. We filed the first complaint against the NFL, Maxwell v. NFL, in Los Angeles Superior Court on July 19, 2011. The complaint was filed on behalf of seventy-three former NFL players and their wives. The Maxwell complaint alleged that the NFL had a "duty to protect the health and safety of its players by implementing rules, policies, and regulations in an attempt to best protect its

players," but breached that duty by failing to "warn and protect NFL players... against the long-term brain injury risks associated with football-related concussions;" "failing to regulate and monitor practices, games, rules, equipment, and medical care so as to minimize the long-term risks associated with concussive brain injury;" "failing to ensure accurate diagnosis and recording of concussive brain injury;" "failing to enact league-wide guidelines and mandatory rules regulating post-concussion medical treatment and return-to-play standards for players who suffer a concussion." (Maxwell Complaint ¶¶ 114-15, 542, 548).

10. The Maxwell complaint further alleged that "for decades, Defendants have known that multiple blows to the head can lead to long-term brain injury," but that the NFL "made... material misrepresentations... that there was no link between concussions and later life cognitive/brain injury." (Maxwell Complaint ¶¶ 524-61; 587-89).

11. On August 3, 2011, we filed our second complaint, Pear v. NFL, in Los Angeles Superior Court. This complaint was filed on behalf of forty-seven former NFL players and their wives. The Pear Complaint contained similar allegations as those set forth in the Maxwell Complaint. The two cases were designated by the Los Angeles Superior Court as related (i.e. had common issues of fact and law and should be handled by the same judge).

12. The Court should note that the allegations set forth in both Maxwell v. NFL and Pear v. NFL were copied by the Master Administrative Class Action Complaint and Amended Master Administrative Long-Form Complaint, the operative pleadings of the MDL.

13. On October 11, 2011, the NFL removed the Maxwell and the Pear cases to United States District Court for the Central District of California on the basis of federal question jurisdiction. Specifically, the NFL sought to establish jurisdiction under section 301 of the Labor Management Relations Act, arguing that plaintiffs' claims arise from or are substantially dependent upon the terms of the collective bargaining agreement and are therefore preempted by section 301. On November 7, 2011, we filed a Motion to Remand the cases claiming that none of the claims should be preempted by section 301 and thus no federal question jurisdiction existed. The NFL filed an opposition on to the Motion to Remand on November 14, 2011. The Motion to Remand was heard on December 5,

2011, before Judge Real in the U.S. District Court for the Central District of California. The Court relying upon *Stringer v. NFL*, 474 F.Supp.2d 894 (E.D. Ohio 2007) denied our Motion to Remand based upon Collective Bargaining Agreement and section 301.

14. All of the efforts on behalf of the Plaintiffs in the opening stages of litigation were handled by Girardi Keese, Goldberg Persky and White and Russomanno & Borello.

15. On November 15, 2011, the NFL filed a Motion to Transfer and Coordination or Consolidation Pursuant to 28 U.S.C. § 1407 before the Judicial Panel on Multidistrict Litigation. The motion requested that the JPML transfer and consolidate the Maxwell and Pear cases to the Eastern District of Pennsylvania where another action was currently pending. The transfer order was not entered until early 2012, even though it was unopposed by the Maxwell and Pear Plaintiffs.

16. While the NFL's Motion to Transfer and Coordinate was pending, Plaintiffs filed a First Amended Complaint in the Maxwell action on December 9, 2011. On December 20, 2011, the NFL filed a Motion to Dismiss Plaintiffs' First Amended Complaint. The NFL claimed that the case should be dismissed based upon the Collective Bargaining Agreement. On December 27, 2011, Plaintiffs filed an opposition. NFL filed a reply brief on January 23, 2012, and the Motion was set for a hearing in front of Judge Real. Before the Motion could be heard, on January 31, 2012, both the Maxwell and Pear cases were transferred to the Eastern District of Pennsylvania.

17. Although not heard, the Motion to Dismiss was fully briefed by both sides. Plaintiffs argued that the Collective Bargaining Agreement did not apply because: (1) it expressly delegated the duties at issue in the complaint; (2) there was no operative Collective Bargaining Agreement when Plaintiffs' filed their suits; (3) Plaintiffs are all retirees from NFL or spouses; (4) NFL owed a duty to the public at large based upon Brown v. NFL making the Collective Bargaining Agreement in applicable; (5) Plaintiffs' negligence claim is viable based upon Stringer v. NFL, et al; (6) Plaintiffs stated claims for fraud, conspiracy and negligent misrepresentation with sufficient particularity; (7) Plaintiffs' claims are not time barred because the NFL concealed the risks, California's delayed discovery rule and the recent manifestation of Plaintiffs' injuries.

18. The NFL filed substantially the same Motion in the MDL on August 30, 2012, again relying

upon the Collective Bargaining Agreement and § 301 of the Labor Management Relations Act. The parties completed briefing the motions to dismiss on January 28, 2013, and oral argument was heard on April 9, 2013. The opposition filed by the Plaintiffs in the MDL contained arguments identical to those advanced by us in the Maxwell and Pear filings. On July 8, 2013, the Court ordered the parties to mediation and withheld her ruling while settlement discussions took place. A settlement was ultimately reached and a ruling was never issued by the Court.

19. The work undertaken by Girardi Keese, Goldberg Perksy and White, Russomanno & Borello during the litigation of the Maxwell and Pear cases directly benefited the Plaintiffs in the MDL. The legal arguments and theories that we created provided the framework for the Plaintiffs in the MDL litigation. Our firm's early efforts prior to the creation of the MDL were substantial and of lasting value.

20. Our firms submitted declarations that detailed our involvement Pre-MDL to Christopher Seeger for his consideration. Christopher Seeger's Declaration makes it clear that we were not awarded any compensation our Pre-MDL hours. We respectfully request that this court review our submission which is attached hereto as **Exhibit "1"** to my declaration. Since these hours were accumulated prior to the creation of MDL we were not keeping track of our hours. Rather, our fee was based upon our contingency fee agreements with our individual clients. We have submitted reasonable estimates of the time spent in the Pre-MDL time period based upon our knowledge of the litigation and our involvement in the efforts in state and federal court. But, since we do not have documentation of those hours, we are simply requesting a multiplier of our approved hours – a multiplier that will reflect our substantial contribution to the initiation and advancement of this case.

21. In addition to the Pre-MDL work our firms were intimately involved in fielding questions from players and media requests. Our three law firms handled literally hundreds of phone calls from the players or their families. Although an MDL was eventually formed and class counsel appointed, the players and their families continued to seek our assistance as we had been their primary point of communication since the beginning. Once the first cases were filed, we received numerous calls from media outlets wanting to cover the story. The publicity that was generated was

a significant favor in the NFL's interest in resolving the class action.

22. In addition to consideration of our Pre-MDL time, we would like to point this Court's attention to some of the issues that have arisen throughout the administrative process with the NFL settlement.

23. The process has experienced significant delays, far greater than what was originally proposed under the settlement agreement. It is my understanding that Brown Greer, the administrative body, has hired five part-time neurologists to review all of the claims. These part-time neurologists see their own patients during the day and spend their evenings and presumably weekends reviewing the NFL claims. As a result, there have been significant delays in receiving final determinations.

24. Additionally, players have been unable to get timely appointments through the Baseline Assessment Program. For example, players in Arizona must wait until Spring of 2018, for an appointment. The current administrative structure of the claims process is flawed, cumbersome, and moves at a glacial pace.

25. After years of litigation, these delays are very frustrating and disheartening for the many clients we represent. Further, while this process has been represented by some counsel to be easy, and to not require the assistance of a lawyer, the reality very different. The process is slow, confusing, and ripe with delays. It is difficult for the attorneys to navigate and would be nearly impossible for clients to navigate on their own. We continue to advocate for our clients in this process in order to ensure the best possible outcome.

26. Further, while the Court has not yet heard the parties' objections to the five percent holdback, I would like to make a proposal for this Court's consideration: allocating some of the attorney's fees that are requested in Christopher Seeger's declaration to a separate fund that would then be used to fund future common benefit work. This would ultimately reduce the five percent holdback to a lower, more appropriate percentage. This would have the net result of giving more money to the injured clients who have been patiently waiting for so many years for resolution of their case.

27. In conclusion, we believe a fair allocation of these fees should be made. The allocation of these fees to our three law firms would be treated against the contingent fee that will be charged to the



players that we represent.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27<sup>th</sup> day of October, 2017 in Los Angeles, California.

s/Thomas V. Girardi  
THOMAS V. GIRARDI



**CERTIFICATE OF SERVICE**

I hereby certify that I have, this day, electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record on this 27th Day of October, 2017.

/s/ Thomas V. Girardi  
GIRARDI | KEESE

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

# IN RE NATIONAL FOOTBALL PLAYERS' CONCUSSION INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Civ. Action No. 14 – 00029 – AB

Plaintiffs,

V.

National Football League and  
NFL Properties LLC,  
Successor-in-interest to  
NFL Properties, Inc.,

## Defendants

THIS DOCUMENT RELATES TO

## All Actions

**Declaration of Anthony Tarricone, Esq. in Support of the Opposition to Co-Lead Counsel’s Petition for an Award of Common Benefit Attorneys’ Fees, Reimbursement of Costs and Expenses, Adoption of a Set-Aside of Five Percent and Certain Incentive Awards**

1. I am an attorney licensed to practice law in the Commonwealth of Massachusetts and the District of Columbia and a partner with the law firm Kreindler & Kreindler LLP (“Kreindler”). I am a member of the Plaintiff’s Steering Committee (“PSC”) for the NFL litigation. I co-chaired the NFL Litigation Communications-Public Relations Committee, which was integral in bringing the NFL to the negotiating table for settlement and encouraging a

3. The proposed fee allocation is manifestly unfair, self-serving and contrary to established principles commonly utilized when allocating common benefit fees. The fact that it was unilaterally proposed with no input from any other lawyers involved in the litigation is obvious on the face of the proposal. The most important factors in dividing fees are the relative risks undertaken by common benefit attorneys and law firms, as well as the value and quality of their contribution to the success of the litigation. Measured against this standard, the one-sided lodestar allocation proposed by Mr. Seeger allocates an unfairly large portion to Mr. Seeger's firm and manifestly unfair fees to other PSC firms that contributed substantially to the success of the litigation and assumed most, if not all, of the risk. Completely ignored in the proposed allocation is any recognition or consideration of: (1) the creative lawyering and advancing of challenging legal theories, and the risks assumed by the lawyers and firms who started the litigation and nurtured it in its infancy; (2) the substantial time commitment and outlay of case costs when the

5. As the Court may recall, when the NFL litigation was in its infancy, the league undertook a public relations campaign designed to discredit the science that drew a connection between concussions and repetitive head trauma and the myriad of illnesses and conditions that plaintiffs claimed in their lawsuits. The NFL's public relations machine went into overdrive defending itself in the court of public opinion.

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BP Deepwater Horizon Oil Spill litigation in Eastern District of Louisiana. In the BP case, my committee was recognized as playing a critical role in countering BP's extensive multi-million dollar publicity campaign by educating the public about the true extent of damage caused by the oil spill and its impact on residents and business in the Gulf Coast region. Mr. Weiss was also familiar with my experience working with communications or "PR" professionals to influence public opinion during my tenure as President of the American Association of Justice (Formerly ATLA), in large part to defeat efforts to take away patients' rights as part of the Affordable Care Act.

7. Early in this litigation, even before the Court's appointment of the Plaintiff's Steering Committee, we worked on devising a coordinated communications strategy that would partner with public relations professionals to vet every media inquiry, push stories of interest to media outlets, develop effective messaging, and work with retired players and their families to help them tell their stories. The goal, ultimately successful, was to educate the public about the science behind the litigation and the reality that NFL players were suffering Traumatic Brain Injury (TBI) and neurological diseases such as ALS, Parkinson's and Chronic Traumatic Encephalopathy (CTE) because they played NFL football, and the NFL's knowledge of the consequences of repetitive head trauma dating back decades. The idea was to influence the dynamics of the litigation by educating the public about the effects of TBI on players and their families after their NFL careers ended, countering the NFL's campaign to demonize players who sued the NFL, and to dispel inaccurate information and myths about retired players.

8. Even before my appointment by the Court to the PSC, I was asked by Sol Weiss to chair the plaintiffs' Communications-Public Relations Committee. Mr. Weiss announced my appointment at the organizational meeting of plaintiff lawyers in Philadelphia on February 21,

2012. At that time, I outlined the strategic plan I envisioned, which was based in part on my vast experience in the BP Deepwater Horizon Oil Spill Litigation. Also during this meeting, Bruce Hagen and Mike McGlamry expressed interest in and were appointed to serve on the committee. A few weeks later, Mr. Weiss appointed Steve Marks of the Podhurst firm to co-chair the committee with me. Thereafter, Mr. Marks and I worked closely in all matters concerning the plaintiffs' strategic communications campaign.

9. Immediately after the organizational meeting on February 21, 2012, I embarked on the task of recruiting an experienced and knowledgeable public relations firm. This was a matter of some urgency, because the press and media coverage was very negative, and we needed someone to professionally handle media inquiries. I first reached out to the PR professional who eventually headed the effort on Thursday, February 23, 2012. At the time he was Director of Communications at the American Association for Justice (AAJ). I had worked with him extensively while I served as AAJ President during 2009-2010 and very much valued his advice and counsel. We communicated further over the weekend, and on Monday February 27, 2012 he introduced me to the firm that we eventually retained—CLS—which he was planning to join after his imminent departure from AAJ.

10. After a formal Request for Proposal (RFP) process that several PR firms participated in, CLS was formally retained in mid-May. On May 22, 2012, a meeting of our committee leadership and the CLS team, which I arranged and attended, was held at the CLS office in Washington, D.C. The purpose of the meeting was to refine the plaintiffs' communications strategy and, more specifically, plan for the "rollout" of the campaign when the Master Administrative Complaint was expected to be filed in early June. This required extensive planning and preparation in a short period of time, though CLS had already been engaged in the project.

11. Once we had selected CLS as our PR firm, it was our committee's job to control and coordinate all media/press inquiries made to any plaintiff's lawyer in the litigation. We also began developing cogent, dynamic messaging about the litigation. We revised and adapted the messaging as needed for different purposes during the life of the case. We performed background briefings and interviews with media and press professionals who were covering the NFL lawsuit or writing stories about the effect of traumatic brain injury on student and professional athletes. We identified retired NFL players and family members who could effectively tell their stories about the true impact of TBI on the retired players and their families. Finally, we facilitated press and media opportunities for educating the public about how the lives of retired players and their families had been and continued to be affected by repetitive head trauma playing NFL football. In short, virtually every piece of information given to the media, and every person who provided that information, came through my committee. Only by carefully regulating the message, and keeping control on the flow of information, were thousands of players and dozens of attorneys able to speak with one voice. It was a monumental undertaking, the success of which led to the settlement, and which was a direct result of our committee's work.

12. A brief timeline of some of my work and the work of our committee, under the direction of Steve Marks and myself, in devising, orchestrating and overseeing the plaintiffs' PR strategy includes:

- a. I Personally recruited the public relations firm that was eventually retained and continued to serve throughout the litigation and settlement process, a process that began immediately after the plaintiffs' organizational meeting on February 21, 2012.

- b. I drafted the Request for Proposal on April 26, 2012, cleared it with Mr. Weiss and others, and sent it to a select group of qualified PR firms on May 1, 2012.
- c. I coordinated the scheduling of interviews for all of the firms that submitted proposals; the interviews were held in early May, and CLS was selected on May 16<sup>th</sup> as the front-runner to serve as our PR professional.
- d. I then negotiated the contract terms with CLS and a contract was prepared and eventually executed.
- e. On May 31, 2012 we sent a formal Media Protocol to all PSC/PEC members, which set forth mandatory procedures for handling all media/press inquiries. We established a special email address for media inquiries and required all inquiries to be submitted to the committee and CLS for vetting and handling. This purpose and terms of the protocol were consistent with what was announced at the organizational meeting, and they were reinforced on multiple occasions in the ensuing months. Key among the purposes of the protocol was to minimize the interaction of lawyers with the media/press and to focus on the real life stories of the plaintiff football players and their families.
- f. In the first days after CLS was formally retained, we began working on a strategic plan, with a focus on using the anticipated filing of the Master Administrative Complaint as a “newsworthy” event to engage interest on the part of the national sports and news media—and educating the public about the concussion litigation through the stories of retired players and their families.
- g. We arranged for and held weekly meetings of the Communications-PR Committee and a second weekly meeting of a smaller core group that consisted



primarily of Mr. Weiss, Mr. Marks, Mr. Seeger, myself and the CLS team. It was in these smaller meetings that important decisions were made concerning our strategic plan.

h. The Master Administrative Complaint was filed on June 7, 2012. On that day and in the days following, through the work of our committee and the professionals at CLS—the NFL concussion lawsuit, featuring in large part the real life stories of retired NFL players and their families, was prominently in the national news, including, among the highlights:

- i. Kevin Turner on Good Morning America;
- ii. Mary Ann Easterling (widow of Ray Easterling) on CNN;
- iii. ABC Evening News with Dianne Sawyer;
- iv. Teleconference featuring Kevin Turner and Mary Ann Easterling, attended by reporters from CBS, ABC, NBC, ESPN, Fox, CNN, Bloomberg, Reuters, New York Times, Atlanta Journal Constitution, Philadelphia Inquirer, HBO Sports, Sports Illustrated, LA Times, Minneapolis Star Tribune, Richmond Times, Milwaukee Journal Sentinel, among others; and
- v. Prominent coverage in/by USA Today, LA Times, Washington Post, AP, Reuters, Sports Illustrated, Chicago Tribune, NPR, Atlanta Journal Constitution, and many more.

13. The success of our PR rollout on June 7, 2012 was due in large part to careful, extensive and intensive planning and coordination, in which I played a leading role throughout. I was involved in preparation of the Talking Points and other briefing materials to be used by all

persons who would interact with the press/media. On June 6, 2012, in preparation for the rollout on June 7<sup>th</sup>, I personally helped coordinate the assignments of committee members and lead counsel to handle “pre-briefings” for key, trusted news and sports media. I, along with Mr. Weiss, Mr. Marks and Mr. Seeger, conducted the “pre-briefings”, which included USA Today, LA Times, Bloomberg, Wall Street Journal, AP, Washington Post, ESPN, and Sports Illustrated. Additionally, our committee was involved in coordinating and preparing the players and family members who would speak on the record—most notably Kevin Turner and Mary Ann Easterling, with respect to whom the Podhurst firm and Anapol Weiss played a major role in facilitating their television and media appearances.

14. Our strategic media plan, which publically began with coverage of the Master Administrative Complaint filing, continued with virtually daily coverage nationally right up until the start of the NFL season, and then daily throughout the season, post-season, and thereafter. It included numerous Op-Eds placed in influential papers, dozens of stories in both the sports and news press and media, and continued appearances by Mr. Turner, Mrs. Easterling, and others. All of the work was overseen by Mr. Marks and myself. The other members of our committee remained engaged throughout and participated as well, especially Mr. Hagen and Mr. McGlamry. Throughout the entire process, we kept leadership informed and engaged.

15. By all accounts, our work was extremely effective and was instrumental in bringing the NFL to the settlement table.<sup>1</sup> A substantial amount of Kreindler’s common benefit time was

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<sup>1</sup> The fee allocation submission to the Court was manipulated to diminish the value of my contribution to the case. When initially provided to Seeger’s office, I was told to remove the language from my declaration (in bold) that underscored its value: “Partner Anthony Tarricone conceived, organized and directed the communications strategy for the litigation, **which was a carefully orchestrated effort that influenced the NFL to engage in settlement negotiations that culminated in the class settlement.**” Exhibit 1. The watered down version of my

spent pre-settlement, when we had no idea if we would ever be compensated. Thus, the time I and my firm spent moving the case toward settlement was both extremely valuable to the resolution of the case and was at risk of being uncompensated if the case was not successful.

16. After submission of my signed Declaration that was appended to Seeger's Petition, I was directed to delete 73.7 hours of partner and associate time and 6.7 hours of paralegal time, because the people who worked these hours did not each record at least 50 hours of time. The work represented by these hours was accurately recorded time for common benefit work that was approved by leadership—as was all time submitted. The value of this work is not included in the lodestar that was used in Seeger's proposed division of fees.

17. The proposed fee allocation also fails to account for the monumental risk that law firms took in starting the litigation against the NFL, both in terms of hours spent on uncertain cases and time spent developing the facts and medical history of each player's case. Without lawyers and law firms willing to risk tens of thousands of hours meeting with clients, being retained, cultivating the attorney client relationship, getting records, hiring experts, etc., there would have been no NFL Concussion Litigation, let alone a settlement. Seeger Weiss came into the litigation with minimal clients, had nothing to do with starting the litigation, and is requesting more than \$70 million or 66% of the common benefit fees to the virtual relative exclusion of eleven other PSC firms that were directly responsible, to varying degrees, of fostering and furthering this litigation.<sup>2</sup> No doubt shepherding the settlement agreement was important, but without lawyers

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declaration was unfairly used to justify minimizing my contribution and lowering the allocation to my firm.

<sup>2</sup> In fact, prior to his appointment by this Court, Seeger had minimal involvement in the litigation against the NFL Parties.

willing to risk millions of dollars in time and money bringing individual cases, the litigation would have gone nowhere. The allocation proposal places no value on those efforts and risks.

18. Beginning in early 2012, my office began meeting with and being retained by retired NFL players to represent them in claims against the NFL relating to concussion injuries that they suffered during their playing careers. By July 23, 2012, my firm had filed lawsuits on behalf of over 135 retired NFL players and their families. Ultimately, we represented over 250 players, but the numbers have diminished because of poaching by other law firms post-settlement and comments by Co-Lead Counsel and the NFL that players don't necessarily need a lawyer.

19. After being retained by NFL clients, my firm undertook the necessary steps to file lawsuits and prosecute their claims. We investigated each case and obtained the information relating to each client's individual claim, including gathering documents and information concerning each player's NFL participation, gathering medical records concerning the player's medical condition, and, for deceased players, getting a family member appointed as the personal representative of their estate. In addition, we regularly communicated updates to our clients to keep them notified regarding the developments in the litigation, settlement, settlement approval process, appeals process, and implementation of the settlement program.

20. As of today, my firm represents 200 clients participating in the NFL Concussion Settlement Program.

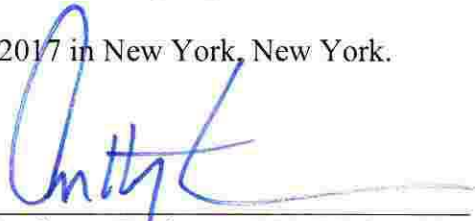
21. At one point in time, the Kreindler firm represented over 250 retired players. We have preserved these 200 clients despite being beset by unscrupulous law firms and case management services unethically contacting our clients directly, spreading misinformation about the terms of the settlement and making false promises to lure away our clients away and get fees from any potential monetary award from the settlement. This pervasive client poaching has greatly

threatened our ability to not only recover our expenses, but also to receive the contracted fees from clients for whom we did the lion's share of the work relating to their claims.

22. To date, apart from the expenses incurred on behalf of the Plaintiff's Steering Committee, the Kreindler firm has incurred \$175,792 in expenses, which we have risked never actually recovering if the case did not settle, was dismissed on one of the many legal defenses, or if our clients do not qualify for compensation under the settlement agreement. This is in addition to Kreindler's contribution of \$120,832 to the common expenses of the litigation.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 27<sup>th</sup> day of October, 2017 in New York, New York.



Anthony Tarricone (MA BBO# 492480)  
Kreindler & Kreindler LLP  
855 Boylston Street  
Boston, MA 02116  
617-413-5565  
[atarricone@kreindler.com](mailto:atarricone@kreindler.com)

## Susan Russo

**From:** Scott George <sgeorge@seegerweiss.com>  
**Sent:** Monday, January 23, 2017 9:38 AM  
**To:** Susan Russo  
**Cc:** Anthony Tarricone; Vaneat Bellizzi, MBA  
**Subject:** RE: NFL - Declaration of Anthony Tarricone

Good morning. I have one additional request – which does not impact the time/lodestar, but requires a minor revision to the declaration. Could Anthony revise paragraph 2 from “Partner Anthony Tarricone conceived, organized and directed the communications strategy for the litigation, which was a carefully orchestrated effort that influenced the NFL to engage in settlement negotiations that culminated in the class settlement.” To something like: “Partner Anthony Tarricone conceived, organized and directed the carefully orchestrated communications strategy for the litigation.”

Let me know if we should discuss anything further. Otherwise, can this be done today?

Scott George  
Seeger Weiss LLP

**From:** Susan Russo [mailto:Srusso@kreindler.com]  
**Sent:** Tuesday, January 10, 2017 2:04 PM  
**To:** Scott George  
**Cc:** Anthony Tarricone; Vaneat Bellizzi, MBA  
**Subject:** RE: NFL - Declaration of Anthony Tarricone

Hi Scott,

Attached is the signed affidavit with exhibits. As you requested, we submitted time for timekeepers with over 50 hours, which only includes Anthony, and revised the declaration to separately state the 80 plus hours expended by others in our firm.

Thank you.

Susan

**From:** Scott George [<mailto:sgeorge@seegerweiss.com>]  
**Sent:** Sunday, January 08, 2017 3:47 PM  
**To:** Anthony Tarricone <[atarricone@kreindler.com](mailto:atarricone@kreindler.com)>; Susan Russo <[Srusso@kreindler.com](mailto:Srusso@kreindler.com)>  
**Cc:** Vaneat Bellizzi, MBA <[VBellizzi@kreindler.com](mailto:VBellizzi@kreindler.com)>; Annika N. Ffrench <[Affrench@kreindler.com](mailto:Affrench@kreindler.com)>  
**Subject:** RE: NFL - Declaration of Anthony Tarricone

We are not challenging the work that was done, but as a general matter (including for my own firm) presenting only timekeepers who contributed over 50 hours to the Court for the purposes of the global lodestar underpinning the Fee Petition. I am happy to discuss further - can we talk tomorrow morning?

Scott George  
Seeger Weiss LLP

**From:** Anthony Tarricone [<mailto:atarricone@kreindler.com>]  
**Sent:** Sunday, January 08, 2017 2:49 PM  
**To:** Scott George; Susan Russo



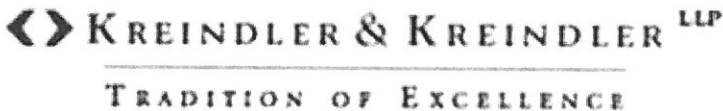
**Cc:** Vaneat Bellizzi, MBA; Annika N. Ffrench  
**Subject:** RE: NFL - Declaration of Anthony Tarricone

Hi Scott—

What is the rationale for not including the others? This was real work that was performed by others because I was unable to do it.

Anthony

**Anthony Tarricone**  
Partner



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Boston, MA 02116-2688 F: 617.424.9120 Web: [www](http://www.kreindler.com)

Please consider the environment before printing this e-mail.

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**From:** Scott George [<mailto:sgeorge@seegerweiss.com>]  
**Sent:** Saturday, January 07, 2017 3:35 PM  
**To:** Susan Russo  
**Cc:** Anthony Tarricone; Vaneat Bellizzi, MBA; Annika N. Ffrench  
**Subject:** RE: NFL - Declaration of Anthony Tarricone

Thank you for this. I have one last request. The declaration template reflects the decision to report for the purposes of the Fee Petition only the time for timekeepers who logged over 50 hours for the common benefit. I need to ask that the Exhibit 1 be revised to remove any timekeeper with 50 or fewer hours and that the hour and lodestar totals in the declaration be revised accordingly.

Scott George  
Seeger Weiss LLP

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**From:** Susan Russo [<mailto:Srusso@kreindler.com>]  
**Sent:** Friday, January 06, 2017 6:25 PM  
**To:** Scott George  
**Cc:** Anthony Tarricone; Vaneat Bellizzi, MBA; Annika N. Ffrench  
**Subject:** NFL - Declaration of Anthony Tarricone

Scott,

Attached is the final Declaration of Anthony Tarricone with attached exhibits and bio. I've also attached the spreadsheet you forwarded questioning duplicate time with my comments and corrections. The duplicate time was deducted from our total in the affidavit. As for the expenses, we found some expenses not previously sent to you and added them to the expense spreadsheet we sent you a month ago (attached again here) it now includes our firm's assessments payments, some additional travel and research charges. Attached is a pdf of the receipts for these expenses.

Please let me know if you have any questions.

Regards,

Susan Russo  
Assistant to Anthony Tarricone

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

# IN RE NATIONAL FOOTBALL PLAYERS' CONCUSSION INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

**Hon. Anita B. Brody**

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Civ. Action No. 14 – 00029 – AB

Plaintiffs,

V.

National Football League and  
NFL Properties LLC,  
Successor-in-interest to  
NFL Properties, Inc.,

## Defendants

THIS DOCUMENT RELATES TO

## All Actions

**Kreindler & Kreindler LLP Opposition to Co-Lead Counsel's  
Petition for an Award of Common Benefit Attorneys' Fees,  
Reimbursement of Costs and Expenses, Adoption of a Set-Aside of  
Five Percent and Certain Incentive Awards filed October 10, 2017**

Kreindler & Kreindler L.L.P. (“Kreindler”) submits this opposition, supported by the declaration of Anthony Tarricone, Esq. filed herewith (“Tarricone Decl.”), to the common benefit fee allocation proposal from Co-Lead Counsel Christopher A. Seeger (“Seeger”) and urges the Court to appoint a Special Master to consider the respective contributions of Plaintiffs’ Steering





On April 25, 2012, this Court *sua sponte* appointed Christopher Seeger, Esq. as Plaintiffs' Co-Lead Counsel and as a member of the Plaintiffs' Executive Committee. *See* 12-md-2323 (E.D.Pa.)(AB), Doc. No. 64, Filed 04/26/2012. Prior to his appointment by this Court, Seeger had minimal involvement in the litigation against the NFL Parties. *See* Tarricone Decl., ¶17, fn 2.

Initially, the NFL litigation was seen as having little chance of success. Nevertheless, many of the PSC law firms invested significant time and money in the litigation at great risk. It is widely understood and accepted that settlement of the NFL concussion litigation was strongly influenced by two important factors: (1) the critical mass of cases filed, and the sheer number of individual retired players involved; and (2) the impact of a carefully orchestrated communications and public relations ("PR") strategy that kept the issue of concussions, chronic traumatic encephalopathy ("CTE") and the plight of thousands of retired NFL players and their families front and center in sports and news coverage throughout and beyond the 2012-13 NFL season. *See* Tarricone Decl., ¶¶ 15 – 17. Kreindler, through its partner Anthony Tarricone, Esq. ("Tarricone"), conceived, devised and co-chaired this effort with PEC member Steve Marks both before and after Tarricone's appointment to the PSC on April 26, 2012. *See* Tarricone Decl., ¶¶ 8-14.

In late 2011 and early 2012 Tarricone began discussions with Sol Weiss, Esq. ("Weiss") about using a coordinated and sophisticated communications and PR strategy to educate the public about the effects of repetitive head trauma on NFL players and the suffering of the thousands of retired players who sustained neurological injury after their NFL careers ended. These discussions culminated in the appointment of Tarricone as Chair of the Plaintiffs' NFL Litigation Communications/Public Relations Committee at an organizational meeting of plaintiffs' counsel

on February 24, 2012.<sup>1</sup> *See* Tarricone Decl., ¶ 8. PEC member Steve Marks was later named Co-Chair of the committee. *See* Tarricone Decl., ¶ 8. Tarricone had overseen a similar strategy in the BP Deepwater Horizon Oil Spill litigation, where a coordinated strategy was employed to counter BP's extensive PR media campaign, which the company had designed to downplay the effects of the oil spill and minimize the role of litigation in redressing the massive losses suffered by Gulf Coast residents and businesses. *See* Tarricone Decl., ¶¶ 6, 8. Before the Court appointed a PSC in the NFL litigation, Tarricone began discussions with PR firms about working with the plaintiffs to devise and execute a strategic communications plan. Then, immediately after his appointment to the PSC, Tarricone compiled a list of prospective firms and drafted a Request for Proposal ("RFP"). *See* Tarricone Decl., ¶¶ 9 – 10. On May 1, 2012, the RFP was sent to several PR firms considered experienced in the kind of work needed for the case. *See* Tarricone Decl., ¶ 12(b). Tarricone then coordinated the scheduling of interviews and, on May 16, 2012, a decision was made to retain CLS and Associates (now CLS Strategies) of Washington DC. *See* Tarricone Decl., ¶ 12(c). Tarricone negotiated the contract terms for CLS's retention.<sup>2</sup> *See* Tarricone Decl., ¶ 12(d).

The Plaintiffs' Communications/PR Committee, under Tarricone's and Marks' direction, thereafter engaged in an organized, intensive and relentless communications campaign designed to overcome negative attitudes about NFL players who filed lawsuits, and the public's misunderstanding and ignorance about the reality of Traumatic Brain Injuries (TBI) suffered by NFL players and the impact on their families. *See* Tarricone Decl., ¶ 12(e) – (h). The PR

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<sup>1</sup> For months before the Court's formal appointment of a PEC and PSC in April 2012, the plaintiff firms and lawyers who initiated the litigation and were the driving forces behind it were engaged in an organized and coordinated effort to advance the litigation efficiently and effectively. While others were involved, the *de facto* leadership consisted of Anapol Weiss, Locks Law Firm, and Hausfeld.LLP.

<sup>2</sup> Tarricone had previously worked with the PR professional who headed the CLS team during his tenure as President of the American Association for Justice (AAJ).

Committee held weekly telephonic meetings and separate weekly meetings were held with a core group that included the PEC leadership to keep them apprised of the PR strategy and its execution. *See* Tarricone Decl., ¶ 12(g). The public rollout of the PR plan began when the plaintiffs filed the Master Administrative Complaint on June 7, 2012. *See* Tarricone Decl., ¶ 12(h). The committee coordinated prominent coverage in virtually every major news and sports media outlet in the nation—including Good Morning America, ABC Evening News, CNN, USA Today, Sports Illustrated, the Washington Post and others. *See* Tarricone Decl., ¶ 12(h). Thereafter, through the continued and sustained efforts of the committee, the effects of head trauma on retired NFL players became a widely covered daily news story. *See* Tarricone Decl., ¶ 14. It was like a relentless drumbeat, satisfying a key goal of the coordinated communications strategy—to be in the news virtually every day. As a direct result of the committee’s work, public opinion about TBIs and the suits against the NFL was reversed and the NFL never managed, despite repeated efforts, to overcome the swell of opinion in favor of the plaintiffs. *See* Tarricone Decl., ¶ 15. It was a carefully regulated message which required control of the flow of information from thousands of players and dozens of attorneys. *See* Tarricone Decl., ¶ 11.

In addition to Kreindler’s central role in the Plaintiffs’ Communications/PR strategy, the firm played a significant role in building the critical mass of cases that raised the profile of the litigation and raised the stakes for the NFL. Beginning in early 2012, Kreindler began meeting with and being retained by scores of retired NFL players to represent them in claims against the NFL for concussion and neurological injuries suffered during their NFL careers. *See* Tarricone Decl., ¶ 18. By July 23, 2012, Kreindler had filed lawsuits on behalf of over 135 former NFL players and their families. *See* Tarricone Decl., ¶ 18. Currently, Kreindler represents 200 former

NFL players and their families. *See* Tarricone Decl., ¶ 20.<sup>3</sup> During much of the time that Tarricone and others at Kreindler performed work on behalf of the Communications/Public Relations Committee and for individual clients, the prospect of settlement was remote. The NFL Parties were vigorously litigating various legal and factual defenses such as preemption under the National Labor Relations Act, statutes of limitation, causation and others. Given the procedural and factual posture of the case, Kreindler accepted a substantial risk that it would not recover fees or expenses, both on the hundreds of their individual cases and/or the work performed to benefit all non-Kreindler plaintiffs. Ultimately, in no small part due to the dogged and creative work of the Communications/Public Relations Committee, the NFL Parties were engaged in meaningful efforts to resolve the litigation, ultimately leading to the Class Action Settlement.

After the substantial pre-settlement efforts of Kreindler and other firms, this Court approved an amended Class Action Settlement on April 22, 2015. *See* 12-md-2323-AB (E.D.Pa.) (AB), Doc. No. 6510, Filed 04/22/15. Under the terms of that amended Class Action Settlement between the plaintiff class and the NFL Parties, an application for an award of attorneys' fees and reasonably incurred costs, "as contemplated by the Parties in Section 21.1 of the Settlement Agreement," was to be filed after the Effective Date of the Settlement Agreement. *See id.*, p. 6. Section 21.1 of the Settlement Agreement provided that the NFL Parties were to "pay attorneys' fees and reasonable costs" and that "Class Counsel shall be entitled ... to petition the Court *on behalf of all entitled attorneys* for an award of class attorneys' fees and reasonable costs." *See* 12-md-2323-AB (E.D.Pa.) (AB), Doc. No. 6481-1, Filed 02/13/15, ECF p. 82. So long as the total

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<sup>3</sup> At one point in time, the Kreindler firm represented over 250 retired players. The firm has preserved its remaining 200 clients despite being beset by unscrupulous law firms and case management services unethically contacting our clients directly, spreading misinformation about the terms of the settlement and making false promises to lure away our clients away and get fees from any potential monetary award from the settlement.

amount requested in the petition did not exceed \$112,500,000.00, the NFL Parties agreed not to object to the application. *Id.* While the terms of the Settlement Agreement provide for attorneys' fees, the actual allocation (or division) of fees and reimbursement for reasonable costs was ultimately a judicial matter and thus was "subject to the approval of the Court." *Id.* As for a set-aside, while the Settlement Agreement contemplated that Co-Lead Class Counsel might petition for a maximum of five percent of each award, that proposed set aside was understood to be "strictly a matter between and among Settlement Class Members, Class Counsel, and individual counsel for Settlement Class Members" and was, like an award of and allocation of attorneys' fees, subject to judicial review and Court approval. *Id.*

## II. Relevant Law

Kreindler opposes the allocation of common benefit fees that Seeger has proposed, which ignores the substantial role that Kreindler and other plaintiffs' firms played in persuading the NFL Parties to participate in settlement negotiations. The proposal ignores the substantial risk Kreindler faced of not recovering fees or expenses for both its common benefit work and/or its large number of individual cases, and relies solely on a lodestar calculation for its proposed fee allocation, thereby ignoring relevant case law from the Third Circuit and elsewhere regarding the allocation of common benefit attorneys' fees.

Even when a court has appointed various plaintiffs' attorneys to class-wide positions, including class counsel, "the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and are divided up fairly among plaintiffs' counsel." *In re High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220, 227 (5<sup>th</sup> Cir. 2008), citing *inter alia* Manual for Complex Litigation, Fourth, § 14.11 ("The court must distribute the [fee award] among the various plaintiffs' attorneys,

which may include class counsel, court-designated lead and liaison counsel, and individual plaintiff's counsel."); *see also* William B. Rubenstein, *Newberg on Class Actions* § 15:23 (5th ed. 2013) ("[I]t is the court that has the final authority on how the fee is allocated among counsel."). This equitable review function is especially important when the fees will be extracted from a common benefit fund. *See, e.g., Camden I. Cond. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11<sup>th</sup> Cir. 1991.)

The "[h]istorical[]... rationale entitling counsel to a percentage of the common fund derives" in part "from the ... doctrine[] of quantum meruit." *Id.* As the Third Circuit has stated, "[t]he award of fees under the equitable fund doctrine is analogous to an action in quantum meruit: the individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed." *Silberman v. Bogle*, 683 F.2d 62, 64 (3d Cir.1982) (quoting *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir.1973)(*"Lindy I"*); *see also In re Cont'l Bank/Sheldon Somerman & Entities Bank Loan Litig.*, 1989 WL 63235, at \*3 (E.D. Pa. June 9, 1989) ("The award of fees under the common fund doctrine has been analogized to an action in quantum meruit; that is, the individual seeking compensation has benefitted another and seeks payment for the value of the services performed."), *citing Lindy I*, 487 F.2d at 165 and *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

Thus, where, as here, counsel has made an application for the allocation of common benefit attorneys' fees, "the court's equitable review function" is implicated and the proposal must satisfy the court that it is fair to all participants in the litigation, not merely that it fairly compensates the applicant. *Stanford Glaberson et al. v. Comcast Corporation et al.*, 2016 WL 6276233, \*5 (E.D.Pa. October 26, 2016), *citing Camden I Cond. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11<sup>th</sup> Cir.

1991).<sup>4</sup> This is especially true in the unusual situation where plaintiffs’ counsel disagree amongst themselves over the method of allocating the fees to various attorneys.<sup>5</sup>

When determining if a fee application is justified and appropriate, and when the attorneys’ fees will not be paid pursuant to a fee-shifting statute, there is no presumption in favor of allocating fees based on a lodestar method. *In re Diet Drugs*, 582 F.3d 524, 539 (3d Cir. 2009) (affirming district court’s rejection of lodestar calculation for fees in favor of percentage-of-recovery). Rather, the factors that are to be considered when allocating common benefit fees include the “risk of nonpayment” each attorney faced had the litigation not been successful and the “quality of performance”, as well as the numbers of hours of work performed. *Glaberson*, 2016 WL 6276233, \*5. That is, the lodestar – number of hours – is but one of several factors that a court, when exercising its equitable review function and assessing a fee application, must take into account when looking that the final question, which is the value of each firm’s “contribution” to the “ultimate success of the case.” *In re Trans Union Corp. Privacy Litig.*, 2009 WL 4799954, \*23 (N.D. Ill. Dec. 9, 2009); *see also In re Vitamins Antitrust Litigation*, 398 F.Supp.2d at 225, 236 (approving of reduction of fee award from attorney fee pool when “billable hours and lodestar were out of proportion to the value [an applicant firm] added to the case,” and because “[w]hat matters, in the contest of this fee dispute, is ... how [the case] did proceed, and what the firms’ contributions were, as the case proceeded with their involvement.”) For while “[t]he value of time

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<sup>4</sup> Lead counsel making a proposed fee allocation must “apply a universally fair standard of allocation to all participants,” and cannot merely consider its own role. *In re Vitamins Antitrust Litigation*, 398 F.Supp.2d 209, 234 (D.D.C. 2005).

<sup>5</sup> The Ninth Circuit has observed that “there is very little case law concerning the allocation of attorney’s fees among co-counsel.” *In re FPI/Agretech Sec. Litig.*, 105 F.3d 469, 473 (9<sup>th</sup> Cir. 1997). *See also* William B. Rubenstein, *Newberg on Class Actions*, § 15:23 (5<sup>th</sup> ed. 2013) (“As it is typical that multiple counsel can agree among themselves on the allocation of an aggregate fee, the case law outlining fee allocation procedures is relatively sparse.”)



expended with appropriate adjustments may provide *a rough starting point* for assessing the respective roles of counsel, ... it should not be used rigidly as a precise measure to the exclusion of other intangible factors.” 1 Alba Conte, *Attorney Fee Awards* § 2.17 at 71 – 72 (2d ed. 1993) (emphasis added).<sup>6</sup> In addition to the rough approximation of value attributed to time expended, a factor that must be considered is whether an attorney making a fee application had become involved in the case after most of the risk of litigation had been eliminated. See *In re Copley Pharmaceutical, Inc., Albuterol Products Liability Litigation*, 50 F.Supp.2d 1141, 1155 (D.Wyoming 1999), *aff’d and remanded*, 232 F.3d 900 (10<sup>th</sup> Cir. 2000) (applicant “became involved after the Court certified the class and shortly before trial” and thus “did not share the significant risks of other trial counsel who had been involved in this case since its inception.”)

Should various plaintiffs’ counsel disagree about a proposed fee allocation, a special master or magistrate “may be asked by a district court to oversee an attorneys’ fee allocation,” in which case “all interested parties present their data to the deciding officer; have limited if any right to engage in *ex parte* contacts; and may, on a fully developed record,” seek judicial review of the allocation. *In re High Sulfur Content*, 517 F.2d at 232, n. 18. See also *In re Genetically Modified Rice Litigation*, 764 F.3d 864, 872 (8<sup>th</sup> Cir. 2014), *cert. denied*, 135 S.Ct. 1455 (2015) (noting appointment of special master in common benefit case); *Batchelder v. Kerr-McGee Corp.*, 246 F. Supp. 2d 525, 534 (N.D. Miss. 2003) (“The award of attorneys' fees in this case is in an aggregate amount, with distribution among the various firms and attorneys to be made by agreement among class counsel. In the event that class counsel cannot agree to an equitable distribution between

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<sup>6</sup> As Seeger’s declarant Professor Brian Fitzpatrick has said in other litigation, “the lodestar approach [has fallen] out of favor in common fund class actions” and in his “opinion, it does more harm than good to consider class counsel’s lodestar when awarding fees under the percent method.” *In Re: Volkswagen*, 3:15-md-02672-CRB, N.D. Cal., Dkt. 2175-2, at p. 7-17

themselves, the court can then appoint a Special Master, paid from the corpus of the attorneys' fees award, to make both a report to the court and recommendation as to how the funds should be distributed.” (citation omitted)).

An opportunity for all counsel to present evidence and arguments is necessary to “comport with due process considerations.” *In re Copley*, 50 F.Supp.2d at 1150. Accepting the unilateral and self-serving representations of one of two Co-Lead Counsel, and denying the other attorneys who contributed to the common benefit here a chance to demonstrate their entitlement to a proportion of the fees different than Co-Lead Counsel’s proposal, would unfairly deny the other common benefit attorneys due process.<sup>7</sup>

On its face, the allocation of fees and methodology unilaterally employed by Seeger is manifestly unfair. For example, Kreindler was instructed that it had to delete over 80 hours of work because it was accumulated by several lawyers and staff who, individually, did not work more than 50 hours each—without any consideration of the value of the work. Additionally, Seeger has calculated his firm’s lodestar using extremely generous, if not questionable, hourly rates. Indeed, Seeger’s application seeks an hourly rate for one of its partners (TeriAnne Benedetto) of \$895 and another (Jonathan Shub) of \$750, compared to rates of \$465 and \$495 per hour for those same attorneys, respectively, that the Seeger firm sought three years ago in another litigation before this Court. See *McDonough v. Toys R Us, Inc.*, 2:06-cv-00242, E.D. Pa., Dkt. 863-2, at 25. It is difficult to imagine how Seeger calculated such a massive increase in rates in just a three-year period, let alone how it can justify assigning lower rates for work performed by the non-Seeger firms. Here, where there is a common benefit fee recovered as part of the settlement, there is no justification

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<sup>7</sup> Unlike other cases involving common benefit fees, here there was no committee appointed to recommend the fee allocation and no opportunity for participating counsel to have input—other than the submission of time.

for calculating lodestars differently for each firm. This allows one firm's lodestar to be inflated over others without any consideration of the value of work performed.

### **III. Conclusion**

Seeger's proposed fee allocation is manifestly unfair, self-serving and contrary to established principles for dividing common benefit fees. The most important factors in dividing fees are the relative risks undertaken by common benefit attorneys and law firms, and the value and quality of their respective contributions to the success of the litigation. In short – who started the litigation and nurtured it in its infancy? Who spent time and money when the outcome of the litigation was completely uncertain? Whose work and efforts brought the NFL to the negotiating table? The fee proposal submitted in this case improperly values above all time expended when the outcome was not in doubt, a fee paid by the NFL was virtually certain, and the risks were none. It is fundamentally unfair to the lawyers who began this litigation and pushed it forward when everyone doubted its chance of success, and worked tirelessly on behalf of thousands of former NFL players to put the case in a posture where settlement was not only possible, but essential to the NFL's business interests.

*[Remainder of Page Intentionally Left Blank]*

For the reasons set forth herein and in the declaration of Anthony Tarricone, Esq., Kreindler respectfully asks that this Court deny Seeger's fee application and appoint a Special Master or referee to consider the relevant contributions, risks assumed and value that each committee firm provided to the common benefit of all plaintiffs. It is the risks and value that ultimately determine a fair, just and equitable allocation of attorneys' fees after considering the evidence presented by all parties.

Dated: New York, New York  
October 27, 2017

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*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 12-md-2323 (AB)

MDL No. 2323

Kevin Turner and Shawn Wooden, on  
behalf of themselves and others similarly  
situated,

Plaintiffs,

**Hon. Anita B. Brody**

v.

National Football League and NFL  
Properties LLC, successor-in-interest to  
NFL Properties, Inc.,

Defendants.

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**THIS DOCUMENT RELATES TO:  
ALL ACTIONS**

**DECLARATION OF MICHAEL L. MCGLAMRY  
RESPONDING IN OPPOSITION TO CHRISTOPHER A. SEEGER'S PROPOSED  
ALLOCATION OF COMMON BENEFIT ATTORNEYS' FEES, PAYMENT OF  
COMMON BENEFIT EXPENSES, AND PAYMENT OF CASE CONTRIBUTION  
AWARDS TO CLASS REPRESENTATIVES**

Michael L. McGlamry declares, pursuant to 28 U.S.C. § 1746, based upon his personal knowledge, the following:

1. I am *sui juris* and a shareholder in the law firm Pope, McGlamry, P.C. ("Pope McGlamry"). This Declaration is based upon my personal knowledge as is filed in Response and Opposition to Christopher A. Seeger's Proposed Allocation (ECF No. 8447).

2. I am aware that other members of the Plaintiffs' Executive Committee ("PEC"), including Co-Lead Counsel, and of the Plaintiffs' Steering Committee ("PSC"), also have filed

or will file Declarations in opposition to Mr. Seeger's unilateral fee allocation. Among this group are law firms, such as Anapol Weiss, Girardi Keese, Locks Law Firm, Kreindler, Zimmerman Reed, McCorvey Law, LLC, and Hagen, Roskopf & Earle, which have the overwhelming number of individual former player clients whose individual lawsuits were a – if not the – major factor leading to the settlement of this litigation. That almost all of the Plaintiffs' Leadership counsel appointed by the Court oppose the proposed allocation, its timing, scope and effect, demonstrates how unreasonable it is. This issue deserves scrutiny and should involve a Special Master in lieu of Mr. Seeger's unilateral allocation.

3. Along with Co-Counsel Bruce Hagen at Hagen, Roskopf & Earle, Pope McGlamry's involvement in what became known as the NFL Concussion Litigation dates from early 2011. We began meeting with and retaining individual clients at that time, and we filed several of the initial lawsuits against the NFL in the Northern District of Georgia, cases that eventually formed the basis for MDL-2323.

4. I have served as a Court-appointed member of the PSC throughout MDL No. 2323. I have further served as co-chair of the Discovery Committee and as a member of the Communications/ Public Relations and Ethics Committees.

5. My firm has participated Trip Tomlinson and Kimberly Johnson, both Pope McGlamry shareholders, served on the Legal Committee, which held weekly teleconferences, conducted substantive legal research, drafted/ edited form complaints and Case Management Orders, and assisted with drafting the response to the key motion to dismiss regarding whether the former NFL players' claims were preempted under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, due to the Collective Bargaining Agreements between the NFL



ongoing player safety issues raised in this litigation directly resulted from the media and public relations campaign directed and managed by the Communications Committee.

9. Mr. Seeger previously recognized the immense value in the regular work undertaken, before and after the Settlement was announced, and continuing to-date, to provide full and complete information to all parties, the broader player community, and the public, regarding all relevant factual, medical and legal issues implicated by MDL-2323. (*See* ECF No. 7151-2 at ¶ 33). But Mr. Seeger’s proposed fee allocation minimizes the value contributed by the Communications Committee by awarding a “multiplier” of 1 – in reality no multiplier at all – to the time of my firm and the time of Bruce Hagen’s firm.

10. I was also a leading proponent and founder, along with Zimmerman Reed, of the Ethics Committee, which was formed to address ethical and legal issues resulting from the confusion following the settlement. Issues that had to be addressed included withdrawal from representation and lien issues created by the Settlement’s and Co-Lead Counsel Chris Seeger’s failure to address the enforceability of individual contingency-fee agreements between former NFL players or their families and individual counsel. The lack of leadership on this issue has delayed and undermined the ability of any counsel to obtain payment for the substantial work on behalf of their individual clients.

11. There are two key problems with Mr. Seeger’s unilateral fee allocation. One, it is premature, since individual contingent-fee contract issues have not been addressed, and that entirety of time and expense are not accounted for in the proposed allocation, with the exception of Mr. Seeger’s work on behalf of individual class members. Second, it is patently unfair, undermines the contributions of the rest of Plaintiffs’ leadership and appears to suggest that he alone is responsible for the results here.



**The proposed allocation is premature.**

12. Despite repeated requests from me and other members of the PSC, Mr. Seeger has utterly failed to address whether individual contingency fee agreements are enforceable in light of the class action Settlement. Although I have personally questioned Mr. Seeger regarding this issue on multiple occasions, he has stalled, delayed and refused to address this issue. He failed to address this issue at the preliminary and final approval stages, and yet now seeks to collect \$74.5 million in class action “common benefit” fees before counsel for the thousands of injured former NFL players and their families – whose participation created the critical mass necessary to incentivize the NFL to settle – even know whether their contingent fee agreements will be upheld.

13. For example, the enforceability of individual fee agreements was raised by the Estate of Kevin Turner in December 2016. (*See* ECF No. 7029). Some members of the PSC filed briefs supporting the enforceability of such individual contingent fee agreements. (*E.g.*, ECF Nos. 7073, 7075, 7085). But, despite requests by other PSC members, including myself, Co-Lead Counsel Mr. Seeger utterly refused to take a position as to the enforcement of individual fee agreements. Whether individual contingency-fee agreements remain enforceable has not yet been addressed by the Court.

14. Indeed, although Mr. Seeger had very few individual clients in MDL-2323, he made a point of waiving any claim to fees pursuant to any remaining individual retainer agreements. (*See* ECF No. 7151-2 at ¶ 98). This action fanned the flames of frustrated individual clients and their families who, in light of Co-Lead Counsel Mr. Seeger’s decision to reach a class settlement of MDL-2323, seek to avoid paying their individual attorneys, despite voluntarily entering into contingent-fee contracts.

15. Mr. Seeger's suggested allocation of common benefit attorneys' fees is premature and inappropriate until this Court addresses the individual contingent fee contract enforceability issue. Indeed, at this point in time, Mr. Seeger seeks to recoup a substantial windfall for himself, while leaving remaining PSC members and other counsel representing individual clients at a substantial risk that they may never recover anything for the many thousands of hours of time and substantial expenses invested for individual client/ class member claims.

16. In addition to the common benefit work that Pope, McGlamry has performed, Pope, McGlamry has invested substantial amounts of attorney time and resources on behalf of their individual clients/ class members to ensure that they receive their claims are properly evaluated and compensated. None of this time or expense will be compensable unless this Court rules that individual client fee agreements are enforceable. Even if the Court were to enforce individual client contingent-fee agreements, Pope, McGlamry would only be compensated for those individual clients/ class members who obtain a recovery.

17. Pope, McGlamry, jointly with Bruce Hagen of Hagen, Roskopf & Earle, currently represents 404 individual clients – former NFL players or the representatives of the estates of deceased former NFL players – pursuant to individual retainer agreements. Our individual clients are also class members eligible to participate in the settlement of the class action under MDL No. 2323.

18. Pope, McGlamry's work on behalf of individual class members/ clients has included, without limitation, the following:

- a. Investigating individual client cases factually and legally;
- b. Preparing and filing of two Complaints for most individual clients;
- c. Correspondence and individual communications with the individual clients;

- d. Assisting individual clients in filing complaints; discussing opting in, objections, pleadings, motions and orders; addressing settlement discussions and documents; discussing scheduling, appeals, appeal timelines, etc.;
- e. Reviewing and following up on individual client Questionnaires;
- f. Meeting in person with most individual clients;
- g. Identifying physicians and hospitals and collecting records from same for each individual client;
- h. Assisting individual clients with medical appointments;
- i. Helping individual clients determine and prove their number of eligible seasons;
- j. Reviewing medical records to determine any individual diagnoses and the timing of same;
- k. Assisting individual clients with estate issues, including, but not limited to, establishing personal estates, guardianships, etc.;
- l. Assisting individual clients in bankruptcy instances;
- m. Assisting individual clients with medical and claim issues under the Collective Bargaining Agreement, including workers' compensation and disability claims;
- n. Assisting individual clients with inquiries from media sources, including television, internet, radio and newspapers;
- o. Preparing for and holding teleconferences to update clients on at least ten (10) occasions, throughout the course of the litigation;
- p. Drafting and providing client email updates on nearly 40 occasions throughout the course of the litigation; and
- q. Coordinating the May 20, 2014 *Your Brain's Health* event at Emory University Hospital, with Emory physicians, including preparing for the presentation and coordinating the recording of the event.

19. Pope, McGlamry has invested thousands of hours of attorney, paralegal and administrative time performing these tasks for its individual clients who are Settlement class members.

20. In conducting the work for individual clients/ class members described in paragraph 18 above, Pope, McGlamry has also paid substantial sums to prosecute individual cases, including, among others, the costs for:

- a. Medical Records;
- b. Freight/Shipping costs;
- c. Filing Fees (including filing fees for probate cases where applicable);
- d. Travel expenses for client meetings and the JPML hearing to commence the MDL;
- e. Research expenses (Westlaw, Pacer, etc.);
- f. Conference calls; and
- g. Expert consultation expenses.

21. Pope, McGlamry remains committed to representing its clients throughout the settlement process to ensure that they obtain the maximum benefits to which they are entitled under the settlement. This work will also require a substantial investment of time, resources and expenses in the future.

22. The Settlement, which began as a Term Sheet dated August 29, 2013, included the NFL Defendants' agreement not to oppose up to \$112.5 million in common-benefit attorneys' fees, payable by the NFL Defendants. *See In re Nat'l Football League Players' Concussion Injury Lit.*, 307 F.R.D. 351, 374 (E.D. Pa. 2015). But the Settlement and Co-Lead

Counsel Mr. Seeger, were, and have remained, silent as to whether individual contingency-fee contracts between clients and counsel are enforceable, other than specifying that the requested 5% holdback from all awards be taken out of the amount of legal fees otherwise owed.

23. In addition to his requested allocation of \$70 million of common-benefit fees and expenses, Mr. Seeger has double-dipped by obtaining a holdback of 5% of all awards made pursuant to the Settlement. This holdback amount further reduces the amount otherwise payable in attorneys' fees to individual clients' counsel. His request of an additional \$4.7 million from the holdback further demonstrates his demeaning and minimization of the efforts of other counsel. (*See* ECF No. 8447-1 at page 2 of 2 (reporting Seeger Weiss' lodestar as \$18,124,869.10, requesting a 3.885 multiplier, taking this amount to \$70,425,116.45 of the \$107.7 million fees to be allocated, and further requesting \$4,100,280 of the \$4.7 million "part II lodestar" from the 5% holdbacks).

24. My firm formerly represented many more than our current 404 former NFL players and players' families in MDL-2323. But more than eighty (80) of our clients were either improperly "poached" by other counsel or fired us in an attempt to avoid paying attorneys' fees, since the Settlement framework created an environment that encouraged former NFL players to shop for lower contingent fees or try to avoid them altogether.

25. In the course of working with our hundreds of individual clients, Pope McGlamry has incurred thousands of hours in additional attorney and administrative time, none of which was permitted to be included in the common-benefit fee application. Mr. Seeger has acknowledged that Plaintiffs' Counsel, other than Co-Lead Class Counsel, "have devoted hundreds of hours to communicating with Retired NFL Football Players and family members."

(ECF No. 7151-2 at ¶ 51). Yet Plaintiffs’ leadership counsel were specifically instructed to omit such time from their common-benefit fee and expense applications.

26. Mr. Seeger contends that he, like us, “hosts frequent telephone conference calls with retired players and family members to provide updates on the Settlement,” (ECF No. 7151-2 at ¶ 52), and that he, again like Pope, McGlamry, “continues to respond to hundreds of calls each month from Retired NFL Football Players and their families about the Settlement and its Claims Process.” (ECF No. 8447 at ¶ 20a.) Indeed, Mr. Seeger has included the time spent communicating with individual Retired NFL Players and their families in his common-benefit time and sought reimbursement of that time as part of his lodestar (and multiplied by 3.885 as an incentive reward). (*See id.*; ECF No. 8447-1 at p. 2 of 2; ECF No. 7151-2 at ¶ 89 (“Seeger Weiss prepared updates for Class Members and fielded phone calls to provide further information on the updates to Class Members.”)).

27. Our work with individual former NFL players and their families began in 2011. We personally spoke with each former player (or their surviving family members) when they first contacted us, and completed a lengthy survey addressing myriad health issues. That work has continued through today, including, without limitation, items listed in paragraph 18, *supra*, and will continue until every client’s claim has been completed.

28. Members of the PEC and PSC, however, were specifically instructed **not** to include any work on behalf of any individual class member, including communications with such individual class members, in their time detail submitted in support of the common-benefit fee application. Accordingly, Pope McGlamry, and presumably no member of the PSC or PEC – with the notable exception of Mr. Seeger – submitted their time for their many thousands of

hours communicating and working with individual former NFL players or their families as part of the common-benefit fee and expenses application.

29. Similar to Mr. Seeger's statement of the work his firm has done in responding to "hundreds of calls each month from Retired NFL Football Players and their families about the Settlement and its Claims Process," Pope McGlamry has fielded many thousands of similar calls, from the 404 players that we currently represent, as well as with former clients, many of whom were "poached" by other counsel or terminated our representation in seeking to avoid paying any contingency fees. We have also communicated extensively with all of our clients via email, conference call, and in-person meetings.

30. Since the Settlement became effective in January 2017, Pope McGlamry attorneys have spent hundreds of hours every month working with former players and their families on the registration process by: researching evidence of play, gathering employment, and registering former NFL players, their representatives and their family members for the settlement; working with former players to submit BAP appointment requests to Garretson, working on a daily basis with Garretson on issues involving the scheduling process; and gathering medical records and documentation from clients who received a Qualifying Diagnosis prior to the Effective Date to submit claim packages on their behalf, and respond to myriad deficiency notices received regarding same.

31. This work performed by Pope McGlamry is the same work being performed by Seeger Weiss in the implementation and support of the Registration and BAP process. But Pope McGlamry will not be reimbursed for this work through common-benefit fees or through the 5% set-side from any of their clients' awards that Mr. Seeger has requested. (See ECF No. 8447 at ¶ 20a (explaining that Seeger Weiss has been "responding to hundreds of calls from Retired NFL



Football Players and their families” and that it “continues to respond to hundreds” of such calls every month “about the Settlement and its Claims Process.”)

32. In stark contrast, Pope McGlamry and other leadership counsel who are members of the PSC or PEC, save Mr. Seeger, are not receiving any common-benefit fees for any of this work. Attorney’s fees for the few Pope, McGlamry clients whose claims have been approved – and only a few handfuls of claims have yet been approved in the entire Settlement – are being held pending resolution of whether individual contingency-fee agreements will be enforced and lien issues relating to the poaching and firing-to-avoid-fees problems.

33. Indeed, it remains uncertain as to whether Pope, McGlamry (or any other firm or counsel representing individual Former NFL Players or their families) will ever be paid for their work on behalf of individual clients/ class members. As such, Mr. Seeger’s proposed allocation is premature and gives him credit for individual class member work that was excluded from the time submitted by all other counsel. An award or allocation of common-benefit fees is premature until the individual contingency-fee agreement issue has been resolved.

**The proposed allocation is also unfair, particularly in light of the low risk to Mr. Seeger.**

34. Pre-Settlement, PSC, PEC and Co-Lead Counsel worked effectively and efficiently as a team, all with substantive roles, toward the resolution of our clients’ head-injury claims. But, as negotiations continued, and in particular, once the August 2013 Term Sheet, providing up to \$112.5 million in common-benefit fees and expenses was executed, Mr. Seeger excluded leadership and assigned more and more work to his own firm, to build its lodestar, to the exclusion of others.

35. Since 2013, Co-Lead Plaintiffs’ Counsel Christopher Seeger has dictated and strictly controlled the work that could be done in this case, which few counsel could actively



participate in the mediation and settlement process, what each firm and their respective attorneys was permitted to do in furtherance of the common benefit, and whether work on behalf of individual claimants, even in furtherance of the Settlement, could be included as part of the common-benefit expenses. Despite repeated requests for work and to more actively participate by other Court-appointed Plaintiffs' leadership, Mr. Seeger attempted to marginalize and minimize the involvement of all other members of the Plaintiffs' leadership, including my firm, while maximizing his (and his firm's) role in all MDL-2323 work.

36. Mr. Seeger bypassed his own Co-Lead Plaintiffs' Counsel, Sol Weiss of Anapol Weiss, and the Court-appointed PSC and PEC. As is demonstrated by the \$18 million-plus lodestar amount submitted by his firm, Mr. Seeger reserved the vast majority of work for himself and his firm, largely excluding even his Court-appointed Co-Lead Plaintiffs' Counsel Sol Weiss. (See ECF No. 8447-1 at p. 2 (listing a lodestar of \$1,857,436.00 for Anapol Weiss, the firm of Co-Lead Plaintiffs' Counsel, compared to \$18,124,869.10 for Seeger Weiss. Mr. Seeger's firm's lodestar, based on the work that he created and controlled, was 9.76 times that of his Court-appointed Co-Lead counsel's).

37. These skewed numbers vividly demonstrate why the lodestar methodology has come under fire, including its encouragement unjustified work and inefficiencies on the part of attorneys, and imposition of a substantial burden on the courts to review fee applications. See, e.g., *In re Boesky Secs. Lit.*, 888 F. Supp. 551, 561 (S.D.N.Y. 1995) (citing, among other authorities, the Court Awarded Attorney Fees: Report of the Third Circuit Task Force, Oct. 8, 1985, 108 F.R.D. 237, 242 (1985) (Arthur R. Miller, Reporter)).

38. In fact, much of the work that Seeger Weiss has completed relates to issues that Mr. Seeger himself created by omitting the enforceability of individual contingency-fee

agreements from the Settlement and by failing to address the issue since the final Settlement was reached in 2014.

39. Indeed, Mr. Seeger has failed to hold or participate in substantive discussions with MDL-2323's PSC and PEC since 2013. There have been no leadership meetings, no leadership conference calls, and literally no leadership discussions. Mr. Seeger effectively became a solitary dictator over MDL-2323. He has worked to ensure that his application for substantial, inflated common-benefit fees will be determined before the serious questions of individual attorneys' fees and poaching are addressed. Mr. Seeger has instigated an unseemly public fight over fees, undermining the public's (not to mention individual clients') perception of plaintiffs' counsel and the civil justice system.

40. This is simply not how an MDL coordination is supposed to operate. For example, in *In re Zyprexa Prod. Liab. Lit.*, the court noted that the PSCs' responsibilities included initiating, coordinating, and conducting all pretrial discovery on behalf of plaintiffs; acting as a spokesperson for plaintiffs during pretrial proceedings; negotiating and entering into stipulations with defendant; developing and pursuing settlement options with defendant; creating a method for reimbursement for costs and fees for services; and dealing with liens on a national basis. 467 F. Supp. 2d 256, 266 (E.D.N.Y. 2006). Such joint efforts – like those reflected by the PSC's pre-Settlement joint work in this case – can justify a holdback for common-benefit fees and expenses. *See id.*

41. Here, Mr. Seeger has obtained not only a holdback, but an additional \$112.5 million set aside for fees and costs as part of the Settlement, 65% of which he has unilaterally allocated to himself and his firm. Accordingly, even the class aspect of this case is not the traditional “common fund” analysis that considers what percentage of the total amount awarded

to the class can properly be paid to class counsel to compensate for their work for the common benefit.

42. Given all of these issues, it would be unfair and inappropriate to allow Mr. Seeger to arbitrarily allocate common-benefit fees by selecting a multiplier applicable to each firm's lodestar calculation, including his purported decision to "adjust upward the lodestars of the firms that made contributions from the outset of the litigation all the way to its end" or "downward the lodestars of the firms that performed only discrete tasks here and there." (ECF 8447-2 ¶ 8).

43. Mr. Seeger not only decided who would be permitted to perform tasks, he then decided that those he selected would be awarded above and beyond by his application of a multiplier. Likewise, he penalized those firms that he did not select to work through the negotiations and settlement by awarding them only their lodestar, in the case of Pope, McGlamry and nine other firms (and even reducing the lodestar via a multiplier lower than 1 for four firms). *Cf. In re Actos (Pioglitazone) Prod. Liab. Lit.*, No. 6:11-MD-2299, 2017 WL 3033134, at \*34 (W.D. La. July 17, 2017) (explaining that, "[h]istorically, courts in MDLs have utilized a Plaintiff's Fee Committee to provide portions, if not all, of the information to be considered and to provide the recommendations to be used by the Court to make individual allotments . . . ." and providing for Special Master review).

44. Pope, McGlamry undertook significant work throughout MDL-2323 and in support of the Settlement. Pope McGlamry brought individual clients/ class members, including well-respected former NFL players and family members of deceased, well-respected former NFL players, to Philadelphia to participate in the approval hearings.

45. Additionally, the real force behind the settlement of this case was the large number of former NFL players who individually stepped up against the NFL. The firms with the

largest number of clients seem to be overlooked in Mr. Seeger's proposed fee process. Had it not been for firms like ours, there would not have been sufficient pressure on the NFL to reach a settlement. We were instrumental at that time but are apparently forgotten now.

46. Despite Pope, McGlamry's significant, continuous contributions to MDL-2323's prosecution, Mr. Seeger has proposed a so-called "multiplier" of 1 -- effectively no multiplier at all -- to Pope, McGlamry's efficient common-benefit lodestar (\$829,030.00), in his apportionment of common-benefit fees.

47. Mr. Seeger has provided no explanation in his declaration as to the reasoning or justification supporting the various multipliers he used in determining the total appropriate fees to be awarded to each participating law firm, including the use of a 0.75 "multiplier" to four firms' lodestar, reducing (instead of multiplying) their actual fees and costs below the amount of time and expenses that they invested in the case. Of the remaining twenty (20) firms, ten (10) firms, including Pope, McGlamry, were assigned a "multiplier" of one (1) -- suggesting allocation to cover only their time and expenses, with no increase whatsoever for the risks undertaken, quality of work performed, or extra effort incurred to support the Settlement. Ten (10) firms received multipliers varying from 1.25 all the way up to Mr. Seeger's own self-assigned, highest multiplier of 3.885, which raises his \$18 million dollar lodestar to a \$70 million windfall. Mr. Seeger undertook this allocation despite acknowledging that the originally submitted lodestar of \$40,559,978.60, representing 50,912.39 hours of time, subject to an overall 2.6 multiplier, for all firms' lodestars, resulted in a total fee request of \$106,817,220.62. (*See* ECF No. 7151-2 at ¶ 78).

48. Courts have reduced the differentials between multipliers applied to lead counsel and other leadership counsel based on questions of equity and fairness. *See, e.g., In re Gould*

*Secs. Lit.*, 727 F. Supp. 1201, 1207 (N.D. Ill. 1989). Indeed, the requested 3.885 multipliers for Mr. Seeger's firm and 3.55 for Professor Issacharoff are excessive, as "[o]nly in the most exceptional circumstances would this court award a multiplier of 3 or greater." *In re Unisys Corp. Retiree Med. Benefits ERISA Lit.*, 886 F. Supp. 445, 482 (E.D. Pa. 1995). *See also Brytus v. Spang & Co.*, 203 F.3d 238, 243 (3d Cir. 2000) (although multipliers for risk or counsel's expertise can be appropriate in the lodestar cross-check in common fund cases, "they require particular scrutiny and justification") (quoting *In re Prudential Ins. Co. Am. Sales Practice Lit. Agent Actions*, 148 F.3d 283, 341 n. 121 (3d Cir. 1998)).

49. Mr. Seeger's risk, if any, of non-payment, has been minimal since the inception of MDL-2323. First, MDL-2323 has always involved many highly regarded Plaintiffs' firms, all of which were available to contribute to common-benefit expenses and to share in the risk of non-payment. This was not a typical class action in which a single firm bears substantial risk all alone or with a small number of co-counsel. Moreover, at least since the late-August 2013 Term Sheet included \$112.5 million in common-benefit attorneys' fees, Mr. Seeger's risk has been practically extinguished. *See In re Diet Drugs (Phentermine/ Fenfluramine/Dexfenfluramine) Prod. Liab. Lit.*, No. 99-20593, 2016 WL 8732314, at \*4 (E.D. Pa. May 6, 2016) (although the "risk of non-payment must be judged as of the inception of the action and not through the rosy lens of hindsight," courts "reassess the risk" throughout the litigation).

50. In contrast, the risk of non-payment for counsel with substantial numbers of individual clients has continued to-date. Moreover, law firms bearing the most risk in this litigation and settlement process – those firms representing large numbers of former NFL players and their families pursuant to individual contingent-fee agreements whose individual contracts are presently in limbo – are being further penalized by the 5% set-aside Mr. Seeger has

requested. As co-lead counsel, Mr. Seeger unanimously determined that this set-aside would be taken out of any existing individual attorney's fee (should such attorney's fee agreement be upheld). (ECF No. 7151-2 at ¶¶ 101-103). Mr. Seeger, whose firm only ever represented a handful of former players, has withdrawn from representing most all clients. (*See, e.g.*, ECF No. 16 (Mr. Seeger's voluntary dismissal of individual case); 5765, 6138, 6629 (three withdrawals from representation of individual plaintiffs by Mr. Seeger). And it does not appear that Prof. Issacharoff has ever had any clients in MDL-2323.

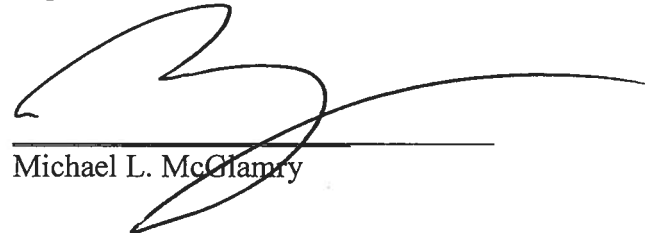
51. Additionally, the Court has now Ordered the Settlement administrator to hold back all fee amounts, pending resolution of individual contingency-fee agreement enforceability issues and the further complication of liens as to NFL Players (and their families) who have hired and fired different counsel through the course of MDL-2323. Thus, the very real risk of non-payment continues for counsel representing individual retired NFL Players and their families, even nearly a year after the effective date of the Settlement.

52. Finally, Mr. Seeger has provided no explanation for why every PSC member firm was not designated as class counsel to administer the settlement in the future. There is no logical explanation for Mr. Seeger's actions in only selecting six (6) PSC member firms to the exclusion of the remaining seventeen (17) PSC member firms. *Cf In re Silicone Gel Breast Implant Prod. Liab. Lit.*, No. CV 92-P-10000-S, 1993 WL 795477, at \*9 (N.D. Ala. June 2, 1993) (notice from silicone gel breast implant litigation, explaining that, "[f]or purposes of this settlement, . . . Class members are automatically represented by the members of the Plaintiffs' Steering Committee previously appointed by the Court in MDL No. 926, who are designated to serve as class counsel for the . . . Settlement Class.").

53. In sum, Mr. Seeger's proposed fee and expense allocation is premature and fundamentally unfair. It should be rejected in favor of the appointment of an independent Special Master to review and address the pending fee issues.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2017, in Atlanta Georgia.



Michael L. McGlamry